



(17,008.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 423.

WILLIAM STEPHENS, MATTIE J. AYERS, STEPHEN G.  
 AYERS, JACOB S. AYERS, AND MATTIE AYERS APPEL-  
 LANTS,

*vs.*

THE CHEROKEE NATION.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
 TERRITORY.

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1 In the United States Court in the Indian Territory, Northern District, Muscogee, I. T.

Be it remembered that on the 29th day of January, A. D. 1897, came into the office of the clerk of this court for the northern district of the Indian Territory, at Muscogee, Indian Territory, William Stephens, Mattie J. Ayers, Jacob Sherman Ayers, and Mattie Ayers, by their counselors and solicitors, George A. Grace and James B. Forrester, Esqs., and file their application for citizenship in the Cherokee nation, Indian Territory, affidavit for an appeal to this court from the decision of the United States commissioners on the 16th day of January, 1897, denying them and each of them admission and enrollment as citizens of the said Cherokee nation, and all the evidence in the case submitted to said commission by said parties and the Cherokee nation.

The application for citizenship is in words and figures, to wit:

*Petition of William Stephens and Others for Admission to Citizenship in the Cherokee Nation, Indian Territory.*

VINITA, IND. TER., August 1st, 1896.

To the U. S. commissioners to the five civilized tribes:

2 Your petitioners, William Stephens, Mattie J. Ayers, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, present this their petition for admission to citizenship in the Cherokee nation, and allege that the petitioner William Stephens is a Cherokee Indian by blood, and that Mattie J. Ayers is his daughter, born in lawful wedlock, and that Stephen Grant Ayers, born January 1st, 1879; Jacob Sherman Ayers, born January 5th, 1881, and Mattie Ayers, born April 9th, 1883, are the children of Mattie J. Ayers, born in lawful wedlock, and are the grandchildren of William Stephens, the petitioner.

Your petitioners have always claimed citizenship in the Cherokee nation, and on the faith of their claim have expended about \$10,000 in improvements on their claims now occupied by them in Cooweescoowee district, Cherokee nation, Indian Territory.

The petitioner's (William Stephens') mother was named Sarah Ellington Shoeboots, who was the daughter of Shoeboots, whose Indian name was Te-as-ki-yarga, a full-blood Cherokee Indian. William Ellington Shoeboots, the uncle of petitioner William Stephens, was the brother to the mother of petitioner William Stephens and the son of Shoeboots, whose Indian name was Te-as-ki-yarga. The said William Ellington Shoeboots' name appears on the now

3 resident old settlers' rolls of Cherokees for the year 1851, and has he drawn from the Cherokee nation his *per capita*. The grandfather of petitioner William Stephens, Te-as-ki-yarga, died before the treaty of 1835. The claim to citizenship of these petitioners has been duly presented to the Cherokee authorities, as required by the laws of said Cherokee nation, and has been rejected,

and the testimony then presented to sustain their said claims is hereto annexed and submitted to sustain the facts stated in this petition. John L. McCoy, William Ellington Shoeboots, and John Harnage, whose affidavits are herewith submitted, as aforesaid, are now dead and were dead at the time of the passage of the act of Congress giving your commission power to hear and determine the claims of persons for citizenship.

The petitioners, for a fuller statement of the facts, submit the following statement of William Stephens:

I reside now and have for the past 24 years resided in the Cherokee nation, eight miles west of Coffeyville, in the State of Kansas. I was born in Clark county, Ohio, on the 9th day of December, 1827. My mother's maiden name was Sarah Ellington Shoeboots; she was a half-breed Cherokee Indian by blood.

4 The story of my mother's blood relationship among the Cherokees is somewhat romantic, which I can only state from what she told me and from general reputation of the pedigree of the family. At an early day, about the year 1780, the exact date I cannot state, my grandmother at that time living near Mount Sterling, Kentucky, at a place called Fort Morgan—the Cherokees then occupied territory in the States of Georgia, Tennessee, North Carolina, and South Carolina—the Cherokees made an assault on the village where my grandmother lived at that time, she being then only 16 years of age, and, among others, they took my grandmother into captivity, and subsequently one of the raiding band took her to be his wife, according to the customs, usages, and laws of the Cherokees. The name of this full-blood who took her to wife was Shoeboots, who was known to the tribe, in their dialect, by the name of Te-as-ki-yarga.

From this union there were born three children, viz., William, Sarah (my mother), and John, born in the respective years of 1801, 1796, 1794, all of whom were born on Hightower river, in the State of Georgia.

5 In the year 1802 my grandmother's people, hearing of her whereabouts, went to the Cherokees and to her husband and prevailed on him, my grandfather, to allow his captive wife and children to return with them on a visit to her people and the scenes of her childhood and native land.

Upon solemn promise from her friends that they would permit her to return with her children to her husband in a certain number of moons, the husband assented to the visit.

The persuasion of relatives and friends dissuaded her from returning to her husband, and, surrounded by white relatives, in the year 1840, she died.

My uncle William remained in Kentucky until after my mother's marriage to my father, in Kentucky, in the year 1820. In the year 1825 my mother moved to Ohio, and about the year 1827, hearing of the death of her father, she returned to the place of his death and received her distributive share of his estate.

At 21 years of years of age I left Ohio and moved to the State of Illinois. This was in the year 1849. My mother moved to Illinois,

where I lived, in 1852. We all lived there until 1870. Louis Downing was then chief of the Cherokee nation. In that year he issued an invitation to all Cherokees not then residing in the Cherokee nation to return to their people and home, and, in pursuance of this invitation, we moved to the Cherokee nation, and as soon as practicable I filed a petition for my mother, myself, 6 and family with the proper Indian authorities, stating the facts constituting my rights as a Cherokee citizen and praying for citizenship, and from that time until the present my family and I have continually resided in the Cherokee nation. I have 400 acres of land fenced and in cultivation, with houses built thereon, the aggregate value of the improvements put thereon being about \$1,200. This includes the preparation of the land for cultivation. All I have is here among my people. In speaking of my family, it is proper to say that I have only one child living, and she is married to a man named Christopher C. Ayers, to whom several communications, to which attention will hereafter be called, are addressed.

From 1873 to 1887 my claim to citizenship extended, and I have always had a firm reliance in the justness of my cause and ultimate admission to full citizenship in the Cherokee nation. There has never been a doubt that I am a lineal descendant of Shoeboots, who was a full-blood Cherokee. I am one-fourth Cherokee Indian by blood.

I have never been treated as an intruder, never served with any process to quit the country as such, and have been treated partially as a citizen, and at one time, to wit, in the year 1873, I was permitted to vote and participate in the election. My mother was living with me when she died, in October, 1875.

I hereto attach exhibits, properly designated, so that your 7 honorable body may at once observe the true condition of my claim.

Your attention is first called to my petition for citizenship, filed April 22, 1879, attached hereto, marked Exhibit "A;" letter of John B. Jones, U. S. agent for the Cherokees, dated Dec. 6, 1873, marked Exhibit "B;" the affidavits of John L. McCoy, an old Indian, who was acquainted with my family from my grandfather down, marked respectively Exhibits "C," "D," and "E," and dated respectively January 31, 1866, February 15, 1888, and May 28, 1891; the affidavit of my mother's brother, William Ellington Shoeboots, giving a full and complete history of my family; he was in 1852 recognized and became a citizen of the Cherokee nation, said affidavit being marked Exhibit "F." The commission on citizenship, June 16, 1888, referred my claim to citizenship, on a technicality upon the construction of an act therein mentioned, to the council of the Cherokee nation, through the then chief of said nation.

Mark well the language of the commissioners' report: "We are, however, satisfied from the testimony in this cause that William Stephens, the applicant, possesses Cherokee blood, as his uncle, William Ellington Shoeboots, appears now on the resident old settlers' roll of Cherokees for the year 1851, and that he, William

- 8 Ellington Shoeboots, is a son of old Te-as-ki-yarga, a Cherokee Indian, who died before the treaty of 1835, who is the grandfather of William Stephens." Exhibit "F."

November 12, 1887, John Harnage made a statement of my family history, showing my rights to citizenship in the Cherokee nation, marked Exhibit "H." November 3, 1888, the citizenship commission reported their reasons for not readmitting me, as will be found in Exhibit "I." On November 14, 1890, the then chief of the Cherokees sent a special message to the Cherokee council, urging that body to admit me to full citizenship. I call your attention especially to this message, as set out in Exhibit "J." I also attach hereto, in the form and the manner above set out, the different communications from various persons, official and unofficial, in relation to my claim, to the end that your honorable body may be fully apprised of all the circumstances in relation to my claim.

I have also in my possession several private letters, which are not hereto attached, which are directed to my son-in-law, C. C. Ayers, from private sources, which will be delivered to the commission if they desire the same. They relate only, however, to the progress and condition of my claim from time to time, and therefore are not considered strictly official.

- 9 Under the agreement entered into between the commissioners of the United States and the Cherokee nation, and ratified by Congress and the national council, "all persons not recognized citizens of the Cherokee nation are to be paid for their improvements when the same is adjusted and they ejected from our country."

I have refused such payments for my improvements, although tendered to me by the Cherokee nation, for the reason that I am a Cherokee by blood, and therefore ought to be admitted to full citizenship.

It will be seen that I am not strictly an intruder. I am a Cherokee Indian by blood and am in the Cherokee nation by the invitation of the chief of the Cherokees, as aforesaid.

I desire further to say that I have never received or claimed one cent from any monies paid my people in either Georgia or the Cherokee nation.

My claim for citizenship is now before you. Now nearing the end of life, after spending nearly a quarter of a century among my people in the Cherokee nation, where I have reared my children, I appeal to you to consider my claim for citizenship and accord me the rights to which I am, as a Cherokee, entitled.

- 10 Relying upon the merits of my cause, and with the firm belief that you will deal equitably with me, this petition is respectfully submitted.

WILLIAM STEPHENS.  
MATTIE J. AYERS.  
STEPHEN GRANT AYERS.  
JACOB SHERMAN AYERS,  
MATTIE AYERS,

Samuel M. Rutherford, United States marshal, northern district,  
Indian Territory.

Main office: Muscogee.

District offices: Vinita, Tahlequah, Miami.

*Terms of Court.*

Muscogee:

First Tuesday in May.

First Tuesday in December.

Vinita:

First Tuesday in February.

First Tuesday in October.

Miami:

First Tuesday in April.

First Tuesday in November.

Tahlequah:

Second Tuesday in April.

Second Tuesday in November.

TAHLEQUAH 8, 14, 1896.

Grace & Forrester, attorneys-at-law, Fort Smith, Ark.

GENTLEMEN: Enclosed find citizenship papers of William Stephens & others. The chief would not sign the petition himself, but had Mr. Jno. L. Adair, the executive sec., receipt me for them. No  
11 charges. If there is anything else I can do for you, let me know.

Yours truly,

R. B. RUTHERFORD, JR.

*Citizenship Document Receipt.*

EXECUTIVE DEPARTMENT, CHEROKEE NATION,  
TAHLEQUAH, INDIAN TERRITORY, Aug. 14, 1896.

Received from Rob't Rutherford, Jr., copies of the following documents, to wit:

The "petition of William Stephens and others to the U. S. commission to the five civilized tribes for admission to citizenship in the Cherokee nation, Indian Territory," consisting of 20 printed pages, certified to by ——— as true and correct copies of the originals, and constituting all of the testimony submitted to the Dawes commission in support of the claim of William Stephens and others for Cherokee citizenship.

By JOHN L. ADAIR,  
*Executive Secretary, Cherokee Nation, Indian Territory.*

Said above-named petitioners state that the facts stated in the foregoing petition are true, as they verily believe.

Signatures:

WILLIAM STEPHENS.

MATTIE J. AYERS.

STEPHEN GRANT AYERS.

JACOB SHERMAN AYERS.

MATTIE AYERS.



Sworn to and subscribed before me this the 4th day of August, A. D. 1896.

[SEAL.]

C. H. LOWERY,  
Notary Public.

Com. expires April 5, 1898.

12 The affidavit for appeal is as follows :

Before the honorable commission to the five civilized tribes.

WILLIAM STEPHENS ET AL.	} Affidavit for Appeal.
vs.	
THE CHEROKEE NATION.	

Now comes the said William Stephens *et al.*, applicants for citizenship in this case, by James B. Forrester, their attorney, and pray an appeal from the decision of the honorable commission to the United States district court, as provided by the act of Congress approved June 10, 1896 ; and the said James B. Forrester, being duly sworn and acting on behalf of said applicants, says that the appeal prayed for in this case is not asked for purpose of delay, but that justice may be done the appellants.

JAMES B. FORRESTER.

Sworn to and subscribed to before me this the 15th day of December, 1896.

[SEAL.]

THOS. E. WARD, N. P.

Com. ex. 12, 23, 1897.

(Endorsed as follows :) Filed Jan. 29, 1897. Jas. A. Winston, clerk.

13 The petition for appeal is as follows :

In the United States Court in the Indian Territory, Northern District, at Muscogee, Ind. Ter.

WILLIAM STEPHENS, MATTIE J. AYERS, STEPHEN GRANT AYERS,	}
Jacob Sherman Ayers, and Mattie Ayers, Appellants,	
vs.	
THE CHEROKEE NATION, Appellee.	

Application for an allowance of an appeal and petition for citizenship, etc.

Now come the appellants, William Stephens, Mattie J. Ayers, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, and petition the court to grant an appeal in said cause from a decision of the commission to the five civilized tribes created and empowered to treat with the five civilized tribes of Indians, to wit, the Cherokees, the Creeks, the Choctaws, the Chickasaws, and Seminoles, and to pass upon and decide application for citizenship in said five



civilized nations; which decision by said commission was rendered by authority of an act of Congress passed and approved June 10, 1896, and by which decision, on the 24th day of November, A. D. 1896, at Fort Smith, Arkansas, the aforesaid appellants were denied their rights to citizenship in the Cherokee nation, Indian Territory.

The facts relied on to sustain their claim to citizenship in 14 the Cherokee nation aforesaid are as follows, to wit: That the said William Stephens is a Cherokee Indian by blood, and that the said Mattie J. Ayers is his daughter, and the other petitioners are the children of Mattie J. Ayers and grandchildren of the said William Stephens, all born in lawful wedlock. The mother of William Stephens, whose maiden name was Sarah Ellington, was the daughter of Clarinda Ellington. Said Clarinda was the wife of a well-known Cherokee of the full blood, named Shoe-Boots, whose Indian name was Te-as-ki-yarga. His rights to citizenship was never denied and always exercised by him. He died prior to the treaty of 1835. The said Shoe-Boots and his wife Clarinda had three children, to wit, John, William, and Sarah, the latter being the mother of petitioner Stephens. The said Sarah married Robert Stephens, the father of the petitioner. He was a full-blooded white man, thus making petitioner Stephens one-fourth Cherokee and three-fourths white by blood, his grandmother, Clarinda, being a white woman. William Ellington Shoe-Boots, a brother of petitioner Stephens' mother, was on the now resident old-settler rolls of Cherokees. The proofs is conclusive as to the Cherokee blood of the petitioners. The petitioners have always claimed citizenship in the Cherokee nation, and on the faith of their claims have expended about \$10,000 in improvements now occupied by them in the Cherokee nation. The petitioner

15 Stephens has resided in the Cherokee nation with his family for the past twenty six years. The above facts are sustained by the affidavits of John L. McCoy, William Ellington Shoe-Boots, and John Harnage, all of whom died before the passage of the act of Congress authorizing said commission to pass upon citizenship cases. They are also sustained by the documents filed and annexed to the petition filed before said commission as well as by the affidavits of Abram Shoe-Boots, C. C. Ayers, Cap. William Jackson, and R. F. Wiley; all of which facts and proof were prior to the 10th day of September, A. D. 1896, filed with and submitted to said commission for its consideration and decision, and a copy of said application and testimony was served on the chief of the Cherokee nation prior to September 10, 1896.

The errors of the commission in rejecting the claims of said appellants for citizenship are the grounds for appeal to this court, to wit:

First. The commission erred in rendering its decision on said claims adversely to appellants and against the proof submitted by said appellants.

Second. The commission erred in refusing the appellants the right and privilege of examining the proof submitted by appellee

16 in support of the answer filed by the appellee and denying appellants the right of filing replication to appellee's answer and producing proof in rebuttal of the proof submitted by appellee.

Third. The commission erred in denying the appellants the right of a trial of their claims by a competent jury.

Fourth. The commission erred in refusing the appellants the right to be present in person or by attorney during the trial and determination of their claims before said commission.

Fifth. The commission erred in examining the claims and proof of appellants and denying the same, while the commission was not clothed with any legal authority or jurisdiction to render a decision on said claims and deny the same.

Sixth. The act of Congress approved June 10, 1896, was unconstitutional and had no power or legal right to confer jurisdiction on said commission to try and determine the rights of citizenship of said appellants, and said commission erred in determining the rights and denying the same to said appellants.

Wherefore the appellants in this cause pray that an appeal be granted to this court, and that a trial *de novo* be granted to appellants, and that appellants be permitted to introduce new testimony,

17 and that an order be made requiring said commission to send all pleadings, papers, and records filed before them in this cause to this court, and that The Cherokee Nation, the appellee in this cause, be cited to appear at this court and plead and defend against the appeal, and show why the appellants should not by the rules, orders, and decisions of this court be adjudged entitled to citizenship in the said Cherokee nation; and the appellants will ever pray.

GEO. A. GRACE AND  
JAMES B. FORRESTER,  
*Attorneys for Appellants.*

(Endorsed as follows:) Filed Jan. 16, 1897. Jas. A. Winston, clerk.

18 In the United States Court in the Indian Territory, Northern District, Muscogee, I. T.

Be it remembered that at a court of the United States in the Indian Territory for the northern district, begun and holden on Monday, the first day of December, 1896, at the United States courtroom, in the town of Muscogee, in the Creek nation, in the Indian Territory, the Honorable Wm. M. Springer, judge of said court, presiding and holding said court, the following proceedings were had, to wit:

19

(FEB'Y 13, '97.)

WILLIAM STEPHENS, MATTIE J. AYERS, JACOB SHERMAN  
 Ayers, Mattie Ayers, Appellants,  
 vs.  
 THE CHEROKEE NATION, Appellee. } # 213.

It appearing to the court that the above-named appellants, William Stephens, Mattie J. Ayers, Jacob Sherman Ayers, and Mattie Ayers, have jointly and severally appealed to this court, within the time prescribed by law, from the decision of the "United States commissioners to the five civilized tribes" in refusing to admit and enrol them and each of them to citizenship in the Cherokee nation, in the Indian Territory, and said appeal appearing in due form and being accompanied with all the evidence had and presented to said United States commission in their application for citizenship, a re-opening of the case here for trial is granted, and both the parties hereto may take additional evidence in said case by depositions or otherwise, to be agreed upon by them, to be submitted in writing; and it is further ordered that R. P. de Graffenried, Esq., be, and he is hereby, appointed as special master in chancery in this case to make a report to this court in writing, at the earliest practicable time, from the evidence on file or that which may hereafter be duly taken, of the status of said appellants to said Cherokee nation, together with all the facts proven by said evidence touching their said application for citizenship, as aforesaid.

21 The following depositions and documentary evidence were read on the final hearing of this cause, which was all the evidence adduced:

*Depositions and Documentary Evidence of Appellants.*

(EXHIBIT "A.")

Before Cherokee commission on citizenship.

FORT GIBSON, C. N., April 22, 1879.

WILLIAM STEPHENS }  
 vs. } Claiming Citizenship.  
 CHEROKEE NATION. }

Claimant respectfully presents that he is a Cherokee Indian by blood, derived from his mother, whose maiden name was Sarah Allenton, who was the daughter of Clarinda Allenton, who (claimant's grandmother on the mother's side) was the wife at one time of a well-known Cherokee named "Shoe Boot," whose Indian name was well known in the war of 1812 with the Creeks and the United States. Claimant's grandmother aforesaid was a white woman taken by the Cherokees during one of their early forays, afterwards taken by the said "Shoe Boot" as his wife, and finally discovered

22 or was discovered by her family, to whom she returned with children of herself and Shoe Boot, one of which children was claimant's mother, then quite young. Claimant's own uncle, William Allenton, now living in Bosque county, near Clifton Mills P. O., Texas, was recognized as a Cherokee by the old-settler Cherokees and drew "*per capita*" as such at their payment of 1851-'2 for himself and family, and to the record of such fact, as well as to himself, claimant respectfully refers, his (claimant's) said uncle claiming and being recognized as the son of the said "Shoe Boot," a well-known Cherokee.

Respectfully submitted.

WILLIAM STEPHENS.

23

UNITED STATES AGENT FOR CHEROKEES,  
TAHLEQUAH, C. N., Dec. 6, 1873.

This is to certify that Sarah J. Dictus and William Stephens have brought proof to show that they have filed their claims for citizenship before the national council through the proper channel, but that no action was reached on their cases.

I have also information that there is good evidence to show that these parties are Cherokees by blood. They will therefore not be interfered with until further notice from this office.

JOHN B. JONES,  
U. S. Agent for Cherokees.

I hereby certify the above and foregoing to be a true and literal copy from the files of this office.

This the 6th day of February, 1880.

WM. P. ASMUS,  
Ass't Exec. Sec. C. N.

24 Personally appeared before me, John Q. Tufts, U. S. Indian agent, John L. McCoy, a Cherokee citizen, who, being duly sworn, makes the following statement in regard to the right to citizenship in the Cherokee nation of William Stevens:

I knew the mother of William Stevens in the year 1827 in the old Cherokee nation, east of the Mississippi river. I knew she was the acknowledged daughter of Shoe Boots, a full-blooded Cherokee Indian, whom I have seen frequently at the council of the nation. When I first saw her it was at my father's house, who lived at the capitol of the Cherokee nation. She came there en route from the State of Kentucky to settle her father's estate and received her portion. The next time I saw her was at Tablequah, the present capitol of the Cherokee nation, in the fall of 1874 or '75. Her son was with her, who is the William Stevens claiming citizenship in the Cherokee nation.

JOHN L. MCCOY.

This 31st day of January, 1880.

JOHN Q. TUFTS,  
U. S. Indian Agent.

COMMISSION ON CITIZENSHIP,  
TAHLEQUAH, I. T., Feb. 15, 1888.

WILLIAM STEPHENS }  
vs.  
CHEROKEE NATION. }

*Supplementary Statement of John L. McCoy.*

The affidavit of John L. McCoy, taken before Tehee court, so called, read to him and acknowledged by him as his statement made before said court in the fall of 1882.

The first time that I saw any of the children of Mrs. Stephens was here at Tahlequah; was some time before the Tehee court above spoken of. I have no personal knowledge that William Stephens is the son of Mrs. Stephens, other than what Mrs. Stephens told me. I think Mrs. Stephens' given name was Annie. When I saw Mrs. Stephens here at Tahlequah I would suppose she was about 70 or 75 years old from her appearance. I don't know whether she had any other children other than William or not. My information is that the mother of Annie Stephens was a white woman. I am acquainted with William Stephens, the applicant. Mrs. Stephens, after I saw her here, went back to Kansas, and, I understand, died there. If William Stephens was the son of Mrs. Annie Stephens he would then have been the grandson of Shoe Boots. I am 75 years old, and am a resident and citizen of the Cherokee nation.

26 Mrs. Annie Stephens was not recognized by any Indians here as a Cherokee except myself, that I know of. I understand that Mr. Stephens informed me that they removed from the State of Illinois to Kansas.

*In re the Indian Citizenship of WM. STEPHENS, now Resident of the Cherokee Nation, Indian Territory.*

On this 28th day of May, A. D. 1891, personally appeared before me, James Brizzolara, a notary public within and for the county of Sebastian, in the State of Arkansas, John L. McCoy, a resident of Canadian district of the Cherokee nation, Indian Territory, who, being duly sworn, deposes and says he is now 71 years of age and a Cherokee Indian by blood, and recognized as a citizen of the Cherokee nation; that he has known William Stephens, who is a petitioner for citizenship in and among said Cherokee tribe of Indians, for about nineteen years; that he knew the mother of said William Stephens. She was a half-breed, or of half-blood Cherokee Indian. He knew his mother in the old Cherokee nation, and first met her there more than sixty years ago. She has, and was then, been recognized as an Indian of half blood and of the Cherokee tribe of Indians. He knew the mother and also the maternal grandmother of the said William Stephens. The father of the mother of William Stephens, the grandfather of Mr. Stephens, was a leading man among the old Cherokees in the old Cherokee nation,

27 now a part of Georgia. He was a full-blood Cherokee Indian by blood, and was called Capt. Shoe-Boots Oo-toh-se-yah-kee. He was about 6 ft. 2 or 3 inches high, of slender build, erect, of very dark complexion, straight black hair, and would weigh about 180 or 200 pounds. He has often seen Capt. Shoe-boots and deposes herein to matters within his personal knowledge. The mother of Mr. William Stephens was the daughter of Captain Shoe-Boots, begotten in lawful wedlock, and Mr. William Stephens is the legitimate son of the daughter of said Captain Shoe-Boots, and therefore the petitioner is one-fourth Cherokee Indian by blood.

JOHN L. MCCOY.

Sworn to and subscribed before me this May 28, 1891.

JAMES BRIZZOLARA,  
Notary Public for Sebastian Co., Ark.

Commission expires January 27, 1894.

28

OFFICE OF COMMISSIONER ON CITIZENSHIP,  
TAHLEQUAH, C. N., Sept. 3, 1883.

WILLIAM STEVENS }  
vs. }  
THE CHEROKEE NATION. }

WILLIAM ELLINGTON SHOEBOOTS, witness produced in open court and being duly sworn on part of the claimant, testifies as follows:

My name is William Ellington Shoeboots. My age is 84 years next October. I reside in Bowie county, Texas. I am a Cherokee by blood. My father was Shoe Boots, and I received my Cherokee blood from him. His Cherokee name was Te-as-ki-yarga. My mother's name was Clarinda Ellington, a white woman. I was born on Hightower, in Georgia. I went from Georgia into Kentucky. My father sent a negro and some ponies with me and my mother to Kentucky to see some of my mother's people. We lived near Mount Sterling, Ky. I lived there with an uncle of mine, Jacob Ellington, a brother of my mother. I was living in Kentucky with claimant's mother, and they went to Ohio. I think they lived there near Hillsboro. William Stevens was the son of Rob't Stevens, a white man. William Stevens' mother was my sister, and Shoe

29 Boots (Te-as ki-yarga) was her father. Shoe Boots was a Cherokee.

Cross-examination by solicitor :

After I left Georgia and went to Kentucky I never came back to Georgia. I had one brother and one sister. There were three children of us. From Kentucky I went to Illinois. I married there, and then moved to Missouri. Then I went to Texas and stayed there; lived here awhile in the country, at Menfuld's, in Flint, and I have been here four or five times. I came here and drew my old-settler payment in 1852. Claimant's mother is now dead. She died up here at Russell Creek, near Chetopa. Then I heard from



Jerry Odle where claimant was, and then we sent letters back and forwards. It was understood that my father was a full-blood Cherokee. I recollect seeing my father, but I was so little that I didn't recollect much about him. I was the youngest of the three children. The other children are dead. I must have been two or three years old when my mother and I went from Georgia to Kentucky. I never saw my father after I left him and went to Kentucky.

By the COURT:

30 My mother told me I was a Cherokee. There is a man here not far off that knew my father. I don't recollect how old I was when my mother died. I don't recollect that I heard of my father's death. The negro that came out to Kentucky with us never went back. We kept him to wait on mother.

How long since you became acquainted with claimant?

I lived near his father in Kentucky. His father was a tanner. I have known him six or seven years. I think I saw the claimant when he was a child. I am not certain, however. It might have been his brother, Jake. I don't think his brother Jake is living.

WILLIAM ELLINGTON <sup>his</sup> x SHOE BOOTS.  
mark.

31

*Application for Citizenship.*

To the honorable the commission on citizenship.

GENTLEMEN: The undersigned, your petitioner, this day makes this his application for readmission to citizenship in the Cherokee nation, in accordance with the constitution and with an act of the national council, approved Dec. 8, 1886, creating your commission, and respectfully makes the following statement of the grounds of his application, to wit: That William Stephens is a nephew of one William Allington or Shoe Boots, who the undersigned firmly believes was duly enrolled upon the old-settler census roll of Cherokees by blood, citizens of the Cherokee nation, taken and made in the year 1851. The undersigned hereby presents the above facts as the lawful grounds for this his application for Cherokee citizenship by blood and respectfully awaits the time when his application shall be truly heard and tried in accordance with the aforesaid law. Age, 60 years; post-office, Coffeyville, Kansas; family, with their relationship attached, is as follows: Number, one; name, William Stephens; sex, male; age, sixty.

In witness of which application I hereunto set my hand on this the 6th day of June, 1887.

WILLIAM STEPHENS.

C. H. TAYLOR, *Attorney.*

## Office commission on citizenship.

TALEQUAH, C. N., June 16, 1887.

Docket.	No. family.	Name.	Age.	Sex.	Residence.	Att'y.
220	1	William Stephens vs. Cherokee Nation. Filed June 16, 1887.	60	Male.	Coffeyville, Ks. Applicants for Cherokee citizen- ship; rolls 1851, O. S. Ancestor, William Shoe- Boots.	C. H. Taylor.

The above case was regularly submitted by plaintiff's attorney, Mr. C. H. Taylor, Mr. Stephens alleging his Cherokee ancestor, one William Shoe Boots, who, the testimony shows, was his uncle and not an ancestor under the law, where it says a lineal descendant (sec. 7 of the act of Dec. 8, 1886); consequently this commission

33 cannot readmit such persons to Cherokee citizenship. We are, however, satisfied from the testimony in this case that William Stephens, the applicant, possesses Cherokee blood, as his uncle, William Ellington Shoe Boots, appears on the now resident old-settler rolls of Cherokees of the year 1851, and that he (William Shoe Boots) is the son of old Te-as-ki-yarga, a Cherokee Indian, who died before the treaty of 1835, who was the grandfather of the applicant, William Stephens. William Stephens has failed, under the above-quoted seventh section of the act of December 8, 1886, to establish his citizenship in the Cherokee nation, as is therein required, and is therefore, under the law, declared not to be a citizen of the said Cherokee nation.

J. T. ADAIR,  
*Chairman Commission.*  
D. W. LIPE,  
*Commissioner.*  
H. C. BARNES,  
*Commissioner.*

The above case reconsidered by the commission and reported to the principal chief, the same as in the Sayer case, page 197 of this book.

CONNELL ROGERS,  
*Clerk Com. on Citizenship.*



34

OFFICE COMMISSION ON CITIZENSHIP,  
TAHLEQUAH, I. T., Nov. 3, 1888.  
EXECUTIVE DEPT C. N., TAHLEQUAH, Nov. 18, 1890.

I hereby certify that the foregoing is a true copy of the record of the late commission court, which record is now on file in this office.

C. J. HARRIS,  
Ass't Sec. C. N.

Copy of finding of the commissioners' court in case of William Stephens vs. Cherokee Nation.

35

NOVEMBER 12, 1887.

WILLIAM STEPHENS }  
vs. } Application for Cherokee Citizenship.  
CHEROKEE NATION. }

JOHN HARNAGE, after being duly sworn, states as follows: I am 70 years old. I reside at Kilgore, Texas. I have met the applicant, William Stephens. I was acquainted with William Ellington. He proved himself to be a Cherokee. In the year 1851 he received annuity from the Cherokee government. His name should appear upon the roll of 1851, western Cherokees. I generally met Ellington at the court-house, in Flint district. I have no knowledge of William Stephens being a relative of Shoe Boots. I never heard him spoken of. I have heard him speak of one or two sisters, but I do not remember the names. I am not acquainted with Ellington's family. I have a faint recollection of seeing William Shoeboots.

Cross-examination:

The investigation of Ellington's case was before a committee of three persons appointed by the Cherokee nation to determine who were entitled to draw *per capita* money. The committee was

36 composed of John Harnage, William Drew, and Louis Rogers.

He was identified by witnesses who knew him and gave his Indian name. The evidence in the Ellington case shows that his mother was a white woman. I don't think that the evidence at the time of the investigation shows that Ellington had any brother. Ellington, who was the son of Shoe Boots, takes the maiden name of his mother, Ellington. The evidence before the committee was very conclusive in Ellington's case as to his Cherokee blood. I do not know what became of Ellington after this. I know nothing of the relationship existing between Stephens and Ellington, only what Stephens has told me himself. I became acquainted with Stephens some three or four years ago.

Statement of John Harnage before senate committee on citizenship.

COMMISSION ON CITIZENSHIP,  
CHEROKEE NATION, IND. TER.,  
TAHLEQUAH, Nov. 3, 1888.

Hon. Joel B. Mayes, principal chief, Cherokee nation, Tahlequah, Ind. Ter.

SIR: We, the commission on citizenship, have the honor to lay before you the application for citizenship of William Stephens and William Shoe Boots and family.

Upon examination of the testimony we are fully satisfied that these parties possess Cherokee blood and are the parties or persons whom they represent themselves to be. William Stephens alleges as his Cherokee ancestor, from whom he has endeavored to prove his rights to citizenship, one William Shoe Boots, and William Shoe Boots alleges as his Cherokee ancestor from whom he has endeavored to establish his citizenship, one John Shoe Boots. These names, William and John Shoe Boots, fail to appear on any of the rolls of Cherokees mentioned in the 7th section of act of Dec. 8, 1886, or those mentioned in act of February 7, 1888.

William Shoe Boots is a son of old Te-as-ki-yarga, a Cherokee Indian who died prior to the treaty of 1835, and the brother of Lizzie and Polly Boots, whose name appears on the emigrant roll of Cherokees in Delaware district for the year 1852 as Cherokees.

Under the 7th section of the act of Dec. 8, 1886, we cannot admit William Shoe Boots and family and William Stephens to Cherokee citizenship, for they have not proven a "lineal descent from a Cherokee ancestor whose name appears on the roll of Cherokees mentioned in the before-cited laws.

William Stephens is the grandson of old Te-as-ki-yarga, before mentioned, and the nephew of William Ellington Shoe Boots, whose name appears on the now resident "old-settler" roll of Cherokees.

We respectfully report these two cases to you for your consideration and such action as you may deem wise in the premises.

Very respectfully, your obedient servants,

J. T. ADAIR, *Ch'm*,  
D. W. LIPE,  
H. C. BARNES, *Com.*

Referred to the National Council.

J. B. MAYES, *Prin. Chief.*

Dec. 4, 1888.

EXECUTIVE DEPT' CHEROKEE NATION, I. T.,  
TAHLEQUAH, Nov. 15, 1890.

To the honorable national council.

GENTLEMEN: I herewith send papers setting forth the claim of William Stephens to Cherokee citizenship. While it is your duty to reject all fraudulent claims to citizenship, you should be willin

to extend to all our race the same rights with ourselves, as this country was intended for homes for the Cherokee people.

You will perceive from the report of the commission on citizenship, addressed to me, gives a clear statement of Mr. Stephens' status as a Cherokee, and it was only a technical reason why he was not admitted by said commission.

39 His right to citizenship by blood was admitted by this commission. Under circumstances connected with the matter you will find that the commission court was thoroughly satisfied with the genuineness of his claim, and another thing speaks in favor of Mr. Stephens' claim—he has never joined the notorious "Citizenship Association," but has modestly relied on what he has just cause to believe to be his rights. No doubt his claim is a just one.

Very respectfully,

J. B. MAYES,  
*Principal Chief C. N.*

(Endorsed as follows:) Filed Aug. 29, 1896. A. S. McKennon, com'r. Filed Jan. 29, 1897. Jas. A. Winston, clerk.

40 In the United States Court in the Indian Territory, Northern District, May Term, A. D. 1897.

WILLIAM STEPHENS, MATTIE J. AYERS, STEPHEN GRANT AYERS, }  
Jacob Sherman Ayers, and Mattie Ayers, Appellants, }  
*vs.*  
THE CHEROKEE NATION, Appellee. }

*Stipulation as to Evidence on File, &c., in Case Cherokee Nation.*

It is hereby agreed and stipulated by and between Hutchings and English, attorneys representing the Cherokee nation, and Grace and Forrester, attorneys representing the above-named appellants in the above-entitled cause, that all the affidavits, depositions, and documentary papers, records, and exhibits offered in evidence before the Dawes commission by the appellants and claimants to citizenship in the Cherokee nation in the above cause on file in this court, and all the affidavits, depositions, documentary papers, and sworn

41 statements of persons filed with and attached to the type-written argument of counsel for appellants in this cause on file herein shall be read and considered in evidence in this case by the master and the court in this cause, subject only to exception, objection for incompetency or irrelevancy. It is further stipulated and agreed that the following certificate:

"UNION AGENCY, MUSCOGEE, I. T., March 22, 1897.

I, Dew M. Wisdom, U. S. Indian agent, certify that the names of  
112. William Shoe Boots,  
113. James Shoe Boots,  
114. Martha Shoe Boots,  
115. Isaac Shoe Boots,

116. Rebecca Shoe Boots,  
 117. Abraham Shoe Boots,  
 appear on the Cherokee old settlers' pay-roll as unclaimed shares,  
 and that these names appear on the 'old-settler' pay-roll of 1851.

DEW M. WISDOM,  
*U. S. Indian Agent,"*

may be read in evidence in this cause, subject only to exception or objection for incompetency or irrelevancy. It is further stipulated and agreed that all the affidavits, depositions, and documentary papers offered by the appellee in evidence in this cause herein before

the Dawes commission may be read and considered in evidence in this cause, subject only to exception or objection for incompetency or irrelevancy. It is further stipulated and agreed that during the pendency and progress of this cause any of the parties hereto may file additional or new testimony herein, subject to objections for incompetency or irrelevancy, but before additional or new testimony is taken or attempted to be taken the opposite or adverse counsel shall submit the questions to be propounded to the witnesses to the counsel on the opposite side, so that they may cross the interrogatories to be propounded to the witness or witnesses.

In witness whereof we have hereunto set our hands this the 25 day of March, 1897.

GRACE AND FORRESTER,  
*Attorneys for Appellants.*  
 HUTCHINGS AND ENGLISH,  
*Attorneys for Appellee.*

(Endorsed as follows:) Filed this — day of March, 1897.

43 ABEL SHOE-BOOTS, being sworn, says:

I live in Cooweescoowee district of the Cherokee nation; am the son of William Shoe Boots, who was a half-breed Cherokee. My father's mother was a white woman. My father's name and that of five children are on the old settlers' roll of 1857. My father was the uncle of William Stephens, the petitioner. I, as well as my father, always recognized their kinship with Stephens.

C. C. AYERS stated on oath that he married the petitioner Mattie J. Ayers, who is the daughter of William Stephens. He has seen Mr. Stephens' mother, who lived with Stephens at the time of his marriage. She had every appearance of being a half-blood Cherokee; has known Allen Gilbert for 15 or 20 years. Last fall a year ago Gilbert was at Tahlequah, and he and Gilbert talked of the Stephens case, when Gilbert volunteered to assist him in the matter of citizenship, and said there was no doubt of the genuineness of Stephens' claim, and introduced him to some of Gilbert's friends who could probably assist him in the matter. Since that time Stephens and Gilbert had a difficulty over a land matter.

Captain WILLIAM JACKSON on oath said that he knows Rothschild, the cattle-buyers. Stephens and Rotchild got into a quarrel  
 44 about some cattle, and Rothchild called Stephens a d—d old negro. He met Stephens' mother also at Tablequah. She told him her maiden name was Ellington, and that she had a brother named William Ellington Shoe Boots. She did not look like she had any colored blood in her. He also saw William Ellington Shoe Boots, who told him that Mrs. Stephens was his sister.

R. F. WILEY on oath says that he was attorney for the nation before the citizenship commission in 1888, when Stephens' case was before it. The proof showed that Capt. Shoe Boots, the alleged grandfather of William Stephens, had two wives at different times. His first wife was a white woman, and by this woman, he thinks the proof showed, he had four children, one of the boys named William Ellington Shoe Boots. The proof showed that the mother of William Stephens was a full sister of this William Ellington Shoe Boots, whose name appears on the old settlers' roll of 1851. After the first wife of Shoe Boots went back to Kentucky he took a negro woman for his wife. He does not recollect how many children she had;  
 45 perhaps three or four. It appears that old Captain Shoe Boots had two families, one by a white woman and the others by a negro woman. The commission was convinced that the mother of William Stephens was a full sister of William Ellington Shoe Boots aforesaid.

The accusation that William Stephens was of colored blood appears to have been suggested to his enemies by reason of the second marriage of his grandfather to an African woman, and is without foundation in fact. It is entirely clear that petitioner William Stephens' mother is the daughter of the first wife, a white woman. We send herewith a photograph of the petitioner, William Stephens.

Respectfully submitted.

GRACE AND FORRESTER,  
*Attorneys for Petitioner.*

46 COMMITTEE-ROOM, SENATE BRANCH OF THE  
 NATIONAL COUNCIL, Dec. 7, 1893.

To the honorable to the national council :

We respectfully beg leave to submit our report.

We have carefully examined all the proff presented in these cases and find that they are Cherokee by blood, and that they are entitled to citizenship in the Cherokee nation. Therefore we would most respectfully recommend that the accompanying bill be passed; all of which is respectfully submitted.

M. V. BENGE,  
 C. E. VANN,  
 GEORGE SANDERS, *Committee.*

J. C. DUNCAN, *Clerk.*

47. An act entitled an act "To readmit the following-named persons to citizenship in the Cherokee nation."

Be it enacted by the national council: That the following-named person- who shall return to the Cherokee nation and permanently settle therein within six months from and after the passage of this act and report to the principal chief for registration as citizens, be and they are hereby readmitted to all the rights and privileges of Cherokee citizenship, by blood:

I. William Stephens; male; age, 60 years.

COMMITTEE-ROOMS, STANDING COMMITTEE.

To the hon. the national council.

GENTLEMEN: Your committee, to whom was referred the case of Wm. Stephens and descendants, Samantha Ayers (daughter), Steven J. Ayers (grandson), Jacob S. Ayers (grandson), & Mattie Ayers, grand-daughter, after due examination, recommend that they be readmitted to citizenship in the Cherokee nation, & ask that the accompanying bill be passed in their favor.

L. DODSON,

*Chairman Standing Committee.*

WM. A. THOMPSON, *Clerk S. C.*

48

*Council Bill No. 29.*

Be it enacted by the national council That William Stephens, aged 67; Mrs. Samantha J. Ayers, age 41 (daughter), Stephen G. Ayers (grandson), age 17, Jacob S. Ayers (grandson) age 13, Mattie J. Ayers, grand-daughter, age 11, be and the same are hereby readmitted to citizenship in the Cherokee nation: Provided the said William Stephens and descendants remove with their effects to the Cherokee nation within the period of six months from the approval of this act by the principal chief.

- 49 Before the Honorables Henry L. Dawes, Frank C. Armstrong, A. S. McKennon, T. B. Cabanis, and A. B. Montgomery, commissioners.

In the Matter of Application of WILLIAM STEPHENS and Others for Citizenship in the Cherokee Nation. Nation's No., 142; Commission's No., —.

Your respondent, S. H. Mayes, principal chief of the Cherokee nation, comes now and demurs to the said application, and for the grounds thereof says:

1st. That this commission has not jurisdiction over the parties or subject-matter of this controversy and no legal right, therefore, to hear and determine the same.

2nd. That the application does not state facts sufficient, if true, to show that the applicants are entitled to citizenship.

Respondent, not waiving his aforesaid demurrer, but insisting

upon the same, for answer to said application says that William Shoe Boots, through whom the petitioners claim to derive their right to citizenship in the Cherokee nation, is not now and has not been a citizen of the Cherokee nation since the removal of said nation west to the Indian Territory, as at present located and defined; that the name of William Shoe Boots does — appear on the authenticated rolls of 1857 of said nation; that neither they nor any of their ancestors now reside or ever have resided in the Cherokee nation and Indian Territory as citizens thereof.

Respondent, for a further and complete defense to the aforesaid application, says that heretofore said applicant was made before a legally constituted court or commission on citizenship having jurisdiction over applicants for readmission to citizenship in the Cherokee nation; that the said case was tried upon its merits; that upon a final hearing judgement was duly given against the applicant and in favor of this nation. A duly certified transcript of the aforesaid proceedings and judgement are annexed hereto and made a part of this answer. Some of said proceedings, having been filed with the respondent's petition, are not included. Respondent further alleges that the case of William Shoe Boots was tried at the same time, a negro deriving his rights through the same ancestor, as shown by the decision of the commission. The depositions, affidavits of witnesses, all of whom are now dead, are also attached hereto, together with other testimony.

51 Having fully answered, your respondent asks to be hence dismissed.

S. H. MAYES,  
Principal Chief Cherokee Nation,  
By HUTCHINGS, HASTINGS AND  
BOUDINOT, Attorneys.

John L. Adair, executive secretary Cherokee nation, having been first duly sworn, states that the matters contained in the foregoing answer are true, to the best of his knowledge and belief.

JOHN L. ADAIR.

Subscribed and sworn to before me this the 9th day of Sept., 1896.

D. J. BALL,  
Notary Public.

(Endorsed as follows:) Filed Oct. 7, 1896. A. M. Jacoway, sec'y.  
Filed Jan. 29, 1897. Jas. A. Winston, clerk.



Office commission on citizenship.

TAHLEQUAH, O. N., June 16, 1887.

Docket.	No.	Names.	Age.	Sex.	Post-office.	Att'y.
	1	William Stephens vs. Cherokee Nation. Filed June 16, 1887.	60	Male.	Coffeyville, Kan. Applicants for Cherokee citizenship. Rolls 1851, O. S. Ancestor, William Shoe Boots.	C. H. Taylor.

(The following was written on the face of above:)

The above case reconsidered by the commission and reported to the principal chief the same as in the Sayes case, page 197 of this book.

CONNEL ROGERS,

*Clerk Com. on Citizenship.*

The above was regularly submitted by plaintiff's attorney, Mr. C. H. Taylor, Mr. Stephens alleging his Cherokee ancestor one William Shoe Boot, who, the testimony shows, was his uncle and not an ancestor under the law when it says a lineal descendant (sec. 7 of the act of Dec. 8th, 1886); consequently this commission cannot readmit such persons to Cherokee citizenship. We are, however, satisfied from the testimony in this cause that William Stephens,

53 the applicant, possesses Cherokee blood, as his uncle, William Ellington Shoeboot, appears on the now resident old settlers' rolls of Cherokees of the year 1851, and that he, William Shoe Boot, is the son of old Tar-ca-ki-ar-ka, a Cherokee Indian, who died before the treaty of 1835, who was the grandfather of the applicant, William Stephens. William Stephens has failed under the above-quoted 7th section of the act of December 8th, 1887, to establish his citizenship in the Cherokee nation, as is therein required, and is therefore under the law declared not to be a citizen of the said Cherokee nation.

J. T. ADAIR,

*Chairman Commission.*

D. W. LIPE,

*Commissioner.*

H. C. BARNES,

*Commissioner.*



## Office commission on citizenship.

TAHLEQUAH, I. T., Nov. 3rd, 1888.

WILLIAM SHOE BOOTS	} Applicant for Citizenship.
vs.	
CHEROKEE NATION.	

JOHN COCHRAN, after being duly sworn, states as follows: I am acquainted with the applicant. When I first saw Capt. Shoe Boots and his negro wife they came to my grandmother's house, where my grandmother *nod* I stayed, and when we went to the table to eat, the question was asked Shoe Boots if he had the woman  
54 for a slave, and his answer was that he had her for his wife.

After he was asked that question and had answered it, he was directed to another house for them to occupy, and they occupied it about two years. My mother died at that place. At that place was born a child to Shoeboots; it was a girl. In a few days he named it Ki-hu-ga. After my mother died a woman by the name of Wasus-ta came *fater* me and I went to her house. I do not recollect when Shoe Boots died. Shoe Boots never came to this country, but his wife came and lived on Honey creek, on Big Mush, in Delaware district. I was acquainted with one Tah-ku-ya-ka. At a big meeting at Red Clay was the first time I ever saw these children; they were twins; they were with these children at the time. I was acquainted with Ka-yu-ga, the sister of applicant. I was not acquainted with the younger ones. In the spring after the big meeting at Red Clay they were gathered up and sent West, and that was the last time I saw them.

## Cross-examination:

I am eighty-six years old. I live at Eu-hil-lee, in the old nation. I lived about fifty yards from Shoe Boots. Ka-hu-ga was the first child of Shoe Boots and his negro wife. The twins were both  
55 boys. Applicant was about eight or nine years old when I saw him at Red Clay. I saw the applicant about three years ago, on Honey creek, after he came West. Mother of the applicant was living at that place, and I only saw *tow* children at that time. I think Capt. Shoe Boots and others came three or four years before I saw them at Honey creek, and I never saw him any more until I saw him recently.

This boy that I saw on Honey creek with his mother was named William Shoeboots. Capt. Shoe Boots was of the Cherokee Indian tribe. Shoe Boots was my mother's uncle. Shoe Boots was of the Wolfe clan and he could not talk any English. I don't know anything about the applicant's family. I don't know when the applicant's mother died. Shoe Boots did not have any more negroes except his wife. She was rather tall, but slender made. I was with them two or three days on Honey creek when they first came out here. I understand that they lived on Honey creek til the war broke out.

HENRY EIFFERT,

Ass't Clerk Commission.

Nov. 3rd, 1887.

OFFICE COMMISSION ON CITIZENSHIP,  
 TAHLEQUAH, I. T., Sept. 28th, 1888.

EDMUND ROSS, who, after being duly sworn, on his oath states that he is a citizen of the Cherokee nation by adoption. I am seventy years old, and live in Tahlequah district. I knew Capt. William Shoe Boots back in the old nation, when he lived with Maj. Ridge. I did not know his mother and father. I knew John Shoe Boots; he was stolen out of the nation. They were free born. The first time I saw William Shoeboots after that time was about three or four years ago, and I recognized him to be the same William Shoe Boots that I knew in the old nation. It has always been my understanding that the applicant had Cherokee blood. I did not know Lewis Shoe Boots. I knew John Shoe Boots in the old nation; he was a fiddler.

I am acquainted with Mary Swagerty. I did not know her in the old nation. I don't know that she is the daughter of John Shoe Boots, tho' I have heard this. I don't remember of seeing a man by the name of Tar-se-ki-atah in the old nation. I was well acquainted with John Shoe Boots' wife in the old nation. Her name was Con-na-we-lee. Maj. Ridge raised her. They say that  
 57 she was a Cherokee. She had long black hair. She was a full-blooded Indian. I don't know that Con-no-we-la was the mother of Mary Swagerty, but I believe she was from the general appearance. I have known Mary Swagerty about four years.

## Cross-examination:

I was born at Poplar Springs, near where Chattanooga now stands. I belonged to John Ross, ex-chief of the Cherokees. Mr. John Ross moved to Ostella, Ga., and Maj. Ridge lived near Mr. Ross. John Ross, my old master, lived on the west side of Ostanala. Maj. Ridge lived on the other side of the river.

It was while I was living on the Ostanala that I became acquainted with William Shoe Boots, the applicant. The last time I saw the applicant in Georgia, I suppose he was about fourteen years old.

When I said that these parties were free born, I meant and do mean that they were reputed. John Ridge lived near Maj. Ridge, all together. I did not know a black woman that lived with Maj. or John Ridge, by the name of "Dolly." I never heard at that time who the mother of William Shoe Boots was. It was said that John Shoe Boots had Con-ne-we-lee for a wife. I did not know of it myself.

58 Mr. John Ross moved from Ostanala up to Red Clay four years prior to the emigration. Con-ne-we-lee had no children when I left and last saw her. John Shoe Boots was stolen before John Ross left Ostanala and moved to Red Clay. I know that Alex.

Vann, a white man, did have Con-ne-we-la for a wife when we left Ostanala and went up to Red Clay. I never heard of Con-ne-we-lu after this time. I don't know whether she was Creek, Cherokee, or some other tribe of Indians.

I knew William Shoe Boots a year or two when he lived with the Ridges on the Ostanala. Mary Swagerty is of about the same complexion of William Shoeboots, who is now present; she may be a little darker.

Attest :

CONNELL ROGERS,  
*Clerk Commission on Citizenship.*

WILLIAM SHOE BOOTS  
vs.  
CHEROKEE NATION.

} Application for Cherokee Citizenship.

NATHANIEL FISH, after being duly sworn, states as follows: I am not acquainted — the application. I was acquainted with old Capt. Shoe Boots. He was a relative of *me* by clan kin. At the last time I saw Capt. Shoe Boots he had with him a wife wearing ornaments like those generally worn by Cherokees, such as earrings.  
59 She was a cold-black negro. Capt. Shoe Boots was about my complexion. What caused me to know that it was his wife and that she was a negro, when we were eating dinner he and his wife sat on the same side and I sat on the other side of the table, and when they were through eating they got up and went out to another house where they usually stayed. *From* the statement I make here is from what I know and saw that makes me believe that he is a descendant of Shoe Boots. When I saw them they had no children. I cannot state that they had no children.

Cross-examination :

I knew Capt. Shoe Boots in the old nation at Lolola. I lived about a day's journey from where Shoe Boots lived. I was well acquainted with Shoe Boots and suppose that he was sixty years old when I first saw him. It was about four years after the Creek war when I saw him, and suppose it was about the year 1814. I am eighty-eight or nine years old. I was about grown when I first saw Shoe Boots. Shoe Boots was a full-blood Cherokee Indian. He could not talk any English, and I never knew of him having any children. I don't know how old she was, but she was a middle-aged woman when I was 19 or 20 years old. I don't know how long they had been married. She grew up at Shoe Boots' house.

60 He had no negro children besides her. His English name was Shoe Boots and his Cherokee name was Ta-se-ke-ya-kah.

I don't know that he came to this country. The only reason that I believe that the applicant is the wife of Shoe Boots is that I saw them in the room together.

I never saw Shoeboots at his old house. Shoe Boots never told me that he had any children at that time. I don't know what became of Shoe Boots' wife after that time, as I have never seen her since that time. I don't know whether Shoeboots was living at that time, when the treaty of 1835 was made, or not.

## Cross-examination by the COURT :

Shoe Boots' wife was a rather tall, heavy-made woman. He had no other negroes about the place.

HENRY EIFFERT,  
*Ass't Clerk Commission.*

August 22nd, 1887.

WILLIAM SHOE BOOTS	} Applicant for Cherokee Citizenship.
vs.	
CHEROKEE NATION.	

On part of the nation.

Mrs. MARY FLEMING, after being duly sworn, makes the following statement: I live in Delaware district, Cherokee nation. I am about sixty-seven years old. I am a Cherokee Indian by blood.

I came to this country with the emigration. I came from near Rome, Ga. I knew two women, Lizzie and Polly Shoe Boots, and knew their mother. Her name was Dollie. I knew Dollie back in the old nation. She belonged to my granny Ridge. She was my father's own aunt. Dollie's Cherokee name was Kakayah. Granny Ridge was the wife of Maj. Ridge. I went to California in 1849. Dollie then belonged to my granny Ridge. She was a slave. Lizzie and Polly were living to themselves when I went to California 1849. They were said to be the daughters of Capt. Shoeboots, and were free. The two daughters married Cherokees; their names not recollected. My recollection is that Capt. Shoe Boots free- these two girls. Granny Ridge died while I was in California. I don't know when Dollie died, but I understand that she died during the war Suoth. I knew Tom Woodard in the old nation. He sold Dollie to Granny Ridge. John, son of Dollie, was sold to a negro trader in the old nation. Tom Woodard owned one negro man of his own that was not related to the Shoe Boots' family. Dollie was a black negro. She was a tall, slender slender woman. I lived with Granny Ridge a great deal after she moved on Honey creek, after Maj. Ridge was killed. She owned Dollie during the time I was with her. I never heard of William Shoe Boots till last June. I only knew the one son that Dollie had.

## Cross-examination :

I thin- Shoeboots was an uncle of Tom Woodard. I don't know under what circumstances Tom Woodard came in possession of the Shoe Boots family. I don't know if my own personal knowledge that they were slaves or not. I suppose that Dollie was a slave, as Tom Woodard sold her as a slave to Granny Ridge. John, the son of Dollie, was not as dark as his mother.

C. C. LIPE,  
*Clerk Commission.*

September 21st, 1887.

OFFICE COMMISSION ON CITIZENSHIP,  
TAHLEQUAH, I. T., Sept. 27th, 1888.

WILLIAM SHOE BOOTS ET AL. }  
 vs. }  
 CHEROKEE NATION.

WILLIAM SHOE BOOTS, who, after being duly sworn, on oath says:

That he is sixty-seven years old. I live in Tablequah district. I am the party that has this case on file for citizenship in the Cherokee nation. I have seven children, named Lizzie Davis *née* Shoe Boots, about thirty-two years old; Willie Shoe Boots, aged about twenty-eight years old; Rufus Shoe Boots, aged twenty-three years old; Flora Shoeboots, aged 19 years; John P. Shoe Boots, aged 17 years; Jim Shoe Boots, aged 14, and Sophie Shoe Boots, aged 13 years. The above-named persons are the children by my present wife.

Mary Swagerty is the daughter of my brother, John Shoe Boots. She has an application on file for Cherokee citizenship in the Cherokee nation and is about forty-nine years old. Her mother  
 63 was a Cherokee woman named Co-ne-wa-la. She, the applicant, was born in Georgia. Maj. Ridge raised her. Her mother was a free woman. I came to this country with John Ridge. I remember of seeing Mary Swagerty in the old nation. I saw Mary Swagerty last in Georgia when she was a little girl. I next saw her in this country about seven years ago, and I recognized her as the same little girl, Mary, who I knew back in the old nation. John Shoe Boots was said to be my father. His name in Cherokee was Tar-se-ka-ya-kah. My mother was a black woman. She had six children by Tar-se-ya-ke-yah. My brothers' and sisters' names were as follows: Lizzie Shoe Boots, John Shoe Boots, Pollie Shoe Boots, Lewis Shoe Boots, William Shoe Boots, myself. Lewis and I were twins. John was called in Cherokee Ah-ta-sa; Lizzie, Ka-  
 64 yu-ka; Polly, Wa-lu; Lewis' name was Armstrong in Cherokee.

Tom Woodard was a nephew of Tar-se-ka-ya-kah. Myself and brothers and sisters were free people and were born of free woman.

## Cross-examination:

I was small when my father died, tho' I can remember him. He died at Thompson's river, on Hightower. After Tar-se-ya-kah died I stayed at Tom Woodard's, the man mentioned above. She was  
 64 grown and had two children when the people emigrated to this country. She married a Cherokee man—a full blood—who went by the name of Ferguson. She was living at Dirt-town at the time of the emigration. John Shoe Boots, my brother, was in Georgia at the time of the emigration. He was grown at the time and had a wife and child. Mary Swagerty was born in the old nation, near Rome, Ga., where her father, John Shoe Boots, lived. John Shoe Boots had an improvement of his own in the old nation. Lizzie Shoe Boots had an improvement of her own in the

old nation. Mary Swagerty was about one year old when the emigration was made.

My knowledge of Mary Swagerty was that she was the daughter of my brother John and from what she told me since in this country. Mary Swagerty is now living with Capt. Smith in Tahlequah district, Cherokee nation. My application gives my *name* as 64, and it should be 68 years old in next month. I stayed with John Ridge after my mother died. No other of my brothers or sisters stayed there with Ridge. Lewis, my brother, had been stolen and carried off. I don't know what became of him after that time. I came to this country with the Ridge family, and so did my mother, Dolly. Lizzie came here with the emigration. My mother and myself remained with John Ridge on Honey creek till his death. I was about grown when he was killed. I was apprenticed to a Mr. Winthrop, a brother-in-law of John Ridge's, to learn the carpenter's trade. Winthrop then died, and then Mrs. Winthrop sent 65 me to Van Buren to learn the blacksmith trade. Dolly, my mother, died during the war, in the Choctaw nation. I left here in 1852 for California and remained there for two years. I went then with William and Calvin Holmes. I drew no money in 1852 with the emigrant Cherokees west. Lizzie, my sister, drew money with the Cherokees in 1852 as a Cherokee Indian by blood. She was then living with a Cherokee by the name of Mortar. Lizzie had children at — time and their names were Claud, Ailsey, Sallie, and Morrison. They were residents of Delaware district. My sister Pooy also drew money in 1852. She was then living with a Cherokee by the name of Joe. She had children, two of whom were named Maria and Louisa. She also had a son named Joe.

Mary Swagerty's husband is named Edward Swagerty—a black man. My wife, the mother — my children, of whom I have been testifying, was a Downing. She was held as a slave in the days of slavery. She had no children prior to my marriage with her.

#### By COURT:

When I went to California I started from Benton county, Arkansas. I don't know that any of my sisters Lizzie's children are now living. I never made any application for any headright after I returned from California.

Attest:

CONNELL ROGERS,  
*Clk Com. on Citizenship.*

66 To his excellency D. W. Bushyhead, principal chief of Cherokee nation, and to the honorable national council of the Cherokee nation.

GENTLEMEN: Your petitioners, the undersigned, most respectfully beg leave to submit the following facts and to ask thereupon your favorable consideration and action:

That your petitioner is a Cherokee by blood; that his rights to Cherokee citizenship was denied, and to establish this he brought suit before the commission on citizenship; that in his absence from court and that while all the time he was intending to prosecute his



said case in good faith to final judgment, as required by the laws of the Cherokee nation, his said case was called for trial, and your petitioner, not being then and there ready for trial and to answer, his said suit was "defaulted" and stricken from the docket without a hearing on the merits and facts in the case.

That subsequently your petitioners endeavored to renew their said suit before the said commission on citizenship, but said commission failed to entertain further your petitioners' suit, holding

67      that a default was a final hearing and disposition of the cause; and your petitioners beg leave further to show that the testimony of most honorable and reliable witnesses, whose attendance could not be had at that time before the said commission; and, further, by a rule of practice ordained by the commission, all witnesses were required to attend in person and testify before said commission, and that by this rule a large and most important part of your petitioners' proof was rendered incompetent and was rejected by said commission, greatly to the disadvantage and damages and rights of your petitioners, and in order further to show your petitioner's cause and complaint he herewith files for your consideration :

1. The deposition of William Ellington Shoe Boots, taken before John Q. Tufts, U. S. agent.

2. His petition, filed before the commission on citizenship Sept. 9th, 1882, and which was withdrawn from the commission on Oct. 4th, 1882.

3. The deposition of William Harnage, taken before Allen Ross, clerk of Tahlequah district, C. N.

4. The deposition of Martha A. Bigby, taken by S. A. Bigby, clerk of Flint district, Cherokee nation.

68      5. Depositions of Ruth Bean, taken by W. C. Ghormley, clerk of Goingsnake district, Cherokee nation.

6. The testimony of John L. McCoy, taken in open court, before the commission, on November 11th, 1882.

Your petitioner further declares that he is a Cherokee by blood, having descended from one of the most prominent and ancient and recognized families of the Cherokee nation, as will appear by the depositions, testimony, and documents filed herewith.

But owing to accidents and causes beyond your petitioner's control he had been denied from a fair trial of his case before the judicial department of the Cherokee nation, and that in consequence of these facts he, his wife, and his children, all of whom join in this petition, most humbly appeal to the executive and legislative power of the nation and ask that a special act be passed for their benefit and they in this way be restored to all the rights and privileges of Cherokee citizenship; and so your petitioners shall ever pray.

WILLIAM STEPHENS.  
ANNA STEPHENS.

69 UNITED STATES OF AMERICA, }  
 Western District of Arkansas, } ss:

I, WILLIAM ELLINGTON SHOE BOOTS, after being duly sworn, say: I am the son of To-os-ki-oka Shoe Boots, a full-blood Cherokee Indian, by Clarendon Ellington (a white woman of the State of Georgia), in the year 1801 or 1802. When I was six or seven years old my father took myself, brother John and sister Kate—my father sending a negro man along by the name of Mingo—and took us to where his people lived, near Mount Sterling, Ky. I lived there til- I was twenty-one years old. My sister during the time we lived here married a man by the name of Robert Stephens, and they moved to Ohio. When I left Kentucky I went to Missouri. I stayed there ten years, and went to Illinois, within fifteen miles of Sangamon river. At this place I was married, and from there I moved to Monticello, Lewis county, Missouri. I left Missouri, I think, in the year 1838 and went to Texas. In the year 1851 I moved to the Cherokee nation, and stayed with a man by the name of Jesse Mayfield, about twenty-five miles from Tahlequah. I remained with him and his family during the whole time I was engaged in establishing my rights as a Cherokee Indian, somewhere between four and five months. Mr. Mayfield is dead, but his wife is still

70 living on the place, as I understand. I proved my right to the satisfaction of the Cherokee council and was admitted as a Cherokee Indian, and I drew what was called the "old-settler Cherokee transportation money," amounting to fifteen hundred and twenty-four dollars and twenty-four cents. I then returned to Texas, where I now live, near Waco. I know William Stephens, now living in the Creek nation, to be the son of my sister and Robert Stephens, at present living near Muscogee, Creek nation, and that he is one-fourth Cherokee Indian, he being a direct descendant of Te-is-ki-oke Shoe Boot, my father.

WILLIAM ELLINGTON SHOE BOOT.

Subscribed and sworn to before me this the twenty-fifth day of June, 1880.

JOHN T. TUFTS,  
*U. S. Indian Agent.*

Union agency, Indian Territory.

71 CHEROKEE NATION, }  
 Tahlequah District. }

Personally appeared before me, Allen Ross, clerk of the aforesaid district, William Harnage, who, after being duly sworn, states: Some time in 1871 I met with Mrs. Stephens at Elua Alberty's, and he told me that he belonged to the Shoeboot family; then I told him that I had met with a half-brother of Shoeboot in Texas some time in 1850. I went to Mr. Anderson's to get a drink of water, and he asked me if I was a Cherokee and a brother of John Harnage, and I told him that I was a Cherokee; then he told me that he had two half-brothers and a sister who were Cherokees. I asked him



who was the father of the children, and he said that he did not know, but his mother always told him that he was an Indian by the name of Shoeboot. He said that his father was named Anderson, and that the father of the other children was named Shoeboots, but the children took the name of Arlington, that of their mother. I asked Anderson if he knew where any of his brothers and sisters were; he said one of them was out West. I told him that he would be entitled to the old-settler money if he would come to the nation and establish his rights. I saw him here and understood that he had established his rights and drawn his money. I saw the  
 72 uncle of the applicant here in 1880, and I recollect him to be the same man that drew his money at the old-settler payment in 1850. States that he has always understood that Shoe Boot had three children by a white woman in the States, and Shoe Boots was a full-blood Cherokee Indian.

W. HARNAGE,

*Associate Judge of the Court of Commission.*

Sworn to and subscribed to before me this the 15th day of September, 1881.

ALLEN ROSS,

*Clerk T. D., C. N.*

CHEROKEE NATION, }  
*Flint District.* }

Personally comes this day before me, clerk of the above-named district, Mrs. N. A. Bigby, who, being duly sworn according to law, deposes and says: I am a resident of Flint district; am a Cherokee by blood; was born in the old nation. I was residing near my present place of residence in the years of 1851-'2, and have resided here ever since, with the exception of a short time during the war. I remember the old-settler payment which took place in 1851. I remember an old gentleman that stayed at our home; his name was Allington or Shoe Boot, and came from Texas here and  
 73 -rew old-settler — for himself and family at the payment of the old settler-. Deponent further states that she has just been visited by the old gentleman, who claimed to be the same one that visited us in 1852, and after a conversation with him I find that from incidents and from circumstances that occurred here at that time that he is the same Allington or Shoe Boot that drew his old-settler money. I also find that his name, with the date of his birth, was recorded in a book by Mr. Mayfield, my first husband, and that I have the book in my possession, and that he was born on the 17th day of October, 1804, and from my knowledge of him I have no hesitancy in saying that he is a Cherokee Indian by blood, and know that he participated in the payment to the old-settler payment as a Cherokee.

MARGARET A. BIGBY.

Subscribed and sworn to before me this the 22nd day of July, 1880.

[SEAL.]

S. A. BIGBY,  
*Clerk of Flint District, C. N.*

74      CHEROKEE NATION,      }  
              *Goingsnake District.* }

This day personally appeared before W. C. Ghormley, clerk of Goingsnake district, Ruth Bean, to me personally known, and, being first duly sworn, deposes and makes the following statement: I am in my eighty-second year and am a Cherokee Indian; was born in the old Cherokee nation, east; am a daughter of Clip Starr, and my husband was John Bean, and he emigrated from the old nation in prior to the treaty of 1835-'6. I was acquainted with a Cherokee Indian by the name of Shoeboots. I saw him at my father's house in the old nation. He came to get my father to write a letter to his wife's people, asking them to bring his wife and children back home to the nation—his wife was a white woman—and that her father had carried her and her children back to the States with a promise to bring them back to the nation, and a failure on their part is the reason that he wanted to write as above stated, and I have been acquainted with one William Stephens about five years, who claims to be a grandson of Shoeboots, and from my acquaintance with him, and from what he says in regard to Shoe Boots' family, and from the strong resemblance he bears old Captain Shoe Boots, I am satisfied that — is just what he claims himself to be, the grandson of the above-named Shoe Boots.

75

(Signed)

<sup>her</sup>  
RUTH x BEAN.  
mark.

Sworn to and subscribed before me this the 21st day of September, 1881.

W. C. GHORMLEY,  
*Clerk Goingsnake District, Cherokee Nation.*

COMMISSIONERS' COURT, September 11th, 1882.

*Testimony of J. L. McCoy.*

I came from home to Tahlequah I don't know how long ago. When I came I met up with a man by the name of William Stephens. He asked me what my name was, and I told him McCoy. He asked me if my name was Alex. McCoy, and I told him that it was not, but Alex. was my father. Stephens said that he had heard his mother speak often of Arch. McCoy. I asked him who his mother was, and he called her name and said she was a daughter of Shoe Boots. He asked me if I knew Shoe Bo-ts, and I told him that I did, back in the old nation. I remembered him well. I used to see him at the council, as my father lived at the council grounds of the nation. I remember a lady well who claimed to be Cherokee; a gentleman was with her. They stopped at our

76

house for the purpose of staying over night. I remember that she said that she was from Kentucky, telling my father this, and that she had learned that her father, Shoe Boots, was dead, and her business was to get at her father's estate, as Shoe Boots was tolerably wealthy and owned slaves. I remember that she asked father to give her advice as to how to get at this estate, and he gave her advice as best he could, and recommended her to go to the chief, John Ross, and establish her Cherokee blood, the daughter of Shoe Boots. I remember that I heard that she went to the chief, Ross, and he must have given her advice as to what to do to get what she wanted. She visited several of the prominent men of the tribe. I understood that such men advised her in the business for which she was there. I very well remember of hearing my father say that he advised her as best he could as what to do. It must have all proved well, to-, as was my understanding. At her first call at my father's house she stopped several days in order to rest, after which she proceeded on to her business and returned back to Kentucky. She stopped at father's on her way back.

77 When I met Stephens here at this place he asked me if I would know his mother, the daughter of Shoe Boots, and my answer was that I thought that I would know her. I think that I would remember her features and countenance, and would know her, as she had features much like her father. The reason for this was that Shoe Boots was a very peculiar man, from the fact that he was a very tall man and wore the garb of a military man. He wore boots the top of which reached above his knees. His hat was that of a British military hat, with a red plume in front, which stuck straight up. His coat was a British uniform coat, which was kipped with red scarlet cloth. Next is that he wore a strap across his shoulders, and on that strap swung a long sword. This was his style when he would come to council. He was of a very dark complexion; he was a full-blood Cherokee; and this woman that Stephens showed me and introduced to me and said that she was his mother, and Stephens asked me if I knew her, and I said that I did, as she was the very model of her father, and the same woman that I saw at my father's house in the old nation. I think it was about 1828 or '27 when I saw her at my father's house, when she was on her way to make a settlement of her father's estate from Kentucky.

78 *Question- from Taylor on Part of the Defense.*

Q. Do you know her given name?

A. No.

By the COURT:

Q. When you saw Mr. Stephens, was that the first time you ever saw him?

A. Yes.

By the COURT:

Q. When Stephens asked you if you would know his mother if you would see her, was she there and did you see her?

A. I did directly; she was at Jesse Wolfe's.

By the SOLICITOR:

Q. When she stopped at your father's, did she have a child?

A. No; she was yet unmarried.

By the COURT:

Q. How came this woman in Kentucky?

A. Her mother took her there, who had separated from Shoe Boots.

By the SOL.:

Q. How long was this after the Creek war?

A. I don't know.

By the COURT:

Q. When you saw this woman at your place, how old was you?

A. About sixteen years old.

By SOL.:

Q. When you saw this woman at Jesse Wolfe's, did you ask her who her father was?

A. I don't recollect that I did.

79 Q. How did you know this woman?

A. I have already stated the facts or reason that I knew her is that she resembled the father, and her features resembled those of her father very much.

By SOL.:

Q. Have you ever asked Shoeboot if this was his daughter or not?

A. No.

By TAYLOR:

Q. When Stephens introduced you to this woman did she tell you that Stephens was her son?

A. After I asked her she said that he was.

By the COURT:

Q. Did this woman tell you her business when she came to Tahlequah?

A. Her son told me.

Q. Did he state with whom he had business?

A. He said his business was to establish their rights in the Cherokee nation.

Q. Did he make application at that time?

A. I don't know, but he had me examined before Keys, the court of evidence.

JOHN L. McCOY.

I certify that the foregoing six pages is the testimony of John L. McCoy in the case of William and Anna Stephens vs. Cherokee nation.

80

Copy.

Page 114, Old Settlers' Pay-roll of 1851.

*Non-residents.*

No. of fam.	Heads of families and children.	No. of Ind.	Amount due each.	Amount of stop pages p'd claims.	Amount paid Indians.	Total am't re- ceived for.	Signatures.
1	William Shoe Boots. Isaac       "       " James       "       " Martha       "       " Rebecca       "       " Abraham       "       "	6	270.95  Total, 1,625.70	129.00	1,496.70	1,625.70	William Shoe Boots.  Witness : S. M. Millard.

Copy from Page 262, Emigrants' Pay-roll, 1852.

Heads of families & children.						
Lizzy Boot. Ail-se. Sally. Lotty. Morrison. Dch-se-gah-yah-ge.	6	556 98	22 68	556 98	Lizzy x Boot.	S. M. Wilard.
Polly Boot. Meriah. Eliza Hammer. Louisa. Lizzy. Mary.	6	556 98	22 68	556 98	Polly x Boot.	S. M. Wilard.

81

# EXECUTIVE DEPARTMENT OF CHEROKEE NATION.

I, John L. Adair, executive secretary of the Cherokee nation, do hereby certify that I have compared the foregoing with the original record in this department, and that the same are correct transcripts and copies therefrom.

In witness whereof I have hereunto set my hand and affixed the great seal of said Cherokee nation, at Tahlequah, this the 9th day of Sept., 1896.

[SEAL.]

JOHN L. ADAIR,  
*Executive Secretary.*

In the matter of application of William Stephens, personally appeared before me Wm. T. Hutchings and made oath that he had carefully and diligently searched the emigrant pay-roll of 1852, and that the name of Wm. Ellington Shoe Boot does not appear on the same. There is no name on the roll approaching it, the name of Shoe Boot nowhere appearing on it; that on page 262 there appears, at numbers 1041 & 1042, the names of Lizzie & Polly Boots, who drew as heads of families, but there is no evidence to show that they were related to or that it was the same name as Shoe Boot.

WILLIAM T. HUTCHINGS.

Subscribed and sworn to before me this the 9 day of Sept., 1896.

[SEAL.]

D. J. BALL,  
Notary Public.

82 UNITED STATES OF AMERICA, } ss:  
Indian Territory, Northern District, }

*Affidavit of Allen Gilbert.*

ALLEN GILBERT, of lawful age, after being duly sworn, states as follows: My name is Allen Gilbert; my age is sixty-three years; I was born in Clark county, Ohio, in Pleasant township, Vienna post-office.

When I was a boy in Ohio I was acquainted with Robert Stevens, the tanner, the father of William Stevens, who is now an applicant, together with his family, for citizenship in the Cherokee nation.

The said Robert Stevens, the father of the said William Stevens, was a white man and was so considered by all the people in that community in which he lived.

The said Robert Stevens and his family were not known or recognized as Indians in that community.

When I was a boy in my teens the said Robert Stevens, together with his family, moved from Ohio to Illinois.

In 1864 I moved from Ohio to Lynn county, Kas. For about ten years before I moved from Ohio I ran a blacksmith shop about 2 miles from where William Stevens, the applicant herein named, was born, and about one mile from where Robert Stevens, the father of the said William Stevens, was living when he moved to the

83 State of Illinois.

In 1867 I moved from Lynn county, Kansas, to the Cherokee nation, Indian Territory, and have resided continuously in the Cherokee nation since that date, except temporarily at Coffeyville, Kansas, to educate my children.

In March, 1870, I was in Chetopa, Kansas, and met the said William Stevens, the applicant herein named, and had a conversation with him, in which conversation he said that he had been in the nation a few weeks. He told me that he owned a little place, and said he thought he could prove up his rights as a Cherokee citizen.

I afterwards met the said William Stevens at the Muscogee fair, and again had a conversation with the said William Stevens, in which conversation he renewed our acquaintance and talked over



old localities where he had lived and about the said Stevens being the son of Bob Stevens, the tanner, who lived on William Foreman Senior's farm and ran the tan yard of William Foreman for a number of years.

The said William Stevens, after this conversation, moved down into the Creek nation, and lived about one mile south of Muscogee. We exchanged visits back and forth, he staying with me often during the time we lived down there. The said William Stevens, after he

84 moved down there, told me that he had filed his claim in the Cherokee nation for citizenship, and said that he had to go to Texas to see his uncle about his proof. His uncle's name was William Ellington Shoe Boots. I afterwards saw his uncle, William Ellington Shoe Boots, at the said William Stevens' house, one mile south of Muscogee, in the Creek nation, and had a conversation with him, in which conversation he stated that he reckoned that the said William Stevens was his nephew, but that he had not seen his sister since they were young folks.

I have been back to Ohio several times since the said William Stevens told me that he had filed his claim for citizenship in the Cherokee nation, and have talked with my father and Thomas Goodfellow and others in regard to Stevens' family being Cherokee Indians, and when I first mentioned it to them it was a surprise to them, and they laughed and shook their heads and said there was something there, but that it was not Indian; their hair was too kinky; that Bob Stevens' wife, the mother of William Stevens, who is an applicant for citizenship in the Cherokee nation, was part black or darkey.

Witness my hand and seal this the 9th day of September, A. D. 1896.

ALLEN GILBERT.

Sworn and subscribed to before me this the 9th day of September, A. D. 1896.

[SEAL.]

D. J. BALL,  
*Notary Public.*

My commission expires —.

(Endorsed as follows:) Filed Jan. 29th, 1897. Jas. A. Winston, clerk.

85 *Deposition of Appellee in Rebuttal.*

STATE OF KANSAS, }  
County of Montgomery, } ss:

On this the 20th day of October, A. D. 1896, personally appeared before me, T. C. Harbourt, a notary public within and for the county and State aforesaid, WILLIAM STEPHENS, who, being by me first duly sworn, deposes and says: I reside eight miles west of Coffeyville, in the Cherokee nation, Indian Territory. I, together with my daughter, Mattie J. Ayers, and her children, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, have filed our petition for

citizenship before the United States commission for the five civilized tribes, at Vinita, where our claims are now pending. In addition to the facts not clearly stated in our said peti-on for citizenship, I state that my grandfather, Shoe Boots, whose Indian name was Te-as-ki-yarga, was a full-blood Cherokee Indian; that my grandmother was a full-blooded white woman, and that my father, Robert Stephens, was a full-blooded white man; that my mother was a half-breed Cherokee and half white by blood; that I am informed and believe that the Cherokee nation has filed an answer to my petition and that of my daughter and grandchildren, and filed an affidavit therewith, made by one Allen Gilbert, of Coffeyville, Kansas, a white man, setting up that I am of African descent. I

86 never saw the said Allen Gilbert or knew him until 18 years ago, when I met him for the first time in the Cherokee nation, and my mother never saw nor was acquainted with him at any time; Gilbert and I had some difference concerning a claim in the Cherokee nation, since which time Gilbert has been my inveterate enemy. I never, until the charge was made by Gilbert, heard that I or any member of my family, lineally or collaterally, directly or remotely, possessed African blood.

WILLIAM STEPHENS.

I certify that the within and foregoing affidavit was read in the presence and hearing of the within and foregoing named William Stephens, and that he signed the same in my presence after having fully understood the contents thereof, and I further certify that he is personally well known to me as a reputable person and worthy of belief, and that after having been duly sworn the truth to speak in relation to the matters *above* which he has deposed he subscribed the within and foregoing affidavit; and I hereby so certify.

This the day and date above written.

T. C. HARBOURT,  
*Notary Public.*

Com. exp's Sept. 8th, 1899.

[SEAL.]

87 Also personally appeared before me Adam Beatty, a farmer; F. Guessner, a merchant for about three years; W. R. Stubblefield, a farmer, all residents of the city of Coffeyville, State of Kansas, and, after having severally been sworn, say:

That they have known the above affiant, William Stephens, for 12 years past; that he is a reputable citizen and a credible person and has always been reputed, since we have known him, as an Indian, as his appearance indicates; and, from their knowledge of him, they believe the statements made by him in the foregoing affidavit are true.

ADAM BEATTY.  
F. GUESSNER.  
W. R. STUBBLEFIELD.

Sworn and subscribed to before me this the 20th day of October,  
A. D. 1896.

T. C. HARBOURT,  
*Notary Public.*

[SEAL.]

Com. exp's Sept. 8th, 1899.

This was all the evidence adduced in this case.

88 The special master herein, on the 26th day of June, 1897,  
filed in this court the following report:

In the United States Court, Northern District, Indian Territory.

WILLIAM STEPHENS ET AL.	} # 213. Report of Special Master.
vs.	
CHEROKEE NATION.	

The above case having been referred to me as special master with instructions to report to your honor my findings of fact, and also the contention of the parties as to the law governing this case, I respectfully state that I have carefully examined the pleadings and all the evidence appellants and the appellee submitted, and, as this is a case of considerable importance, I will quote briefly from each witness.

Appellant William Stephens was born in the State of Ohio and came to the Cherokee nation on the invitation issued by Lewis Downing to all foreign Cherokees to return to their people and become citizens of the nation. He filed application for citizenship before the Cherokee authorities in 1873, and has resided in the Cherokee nation since said time. His application to be readmitted as a citizen of the nation was rejected by the Cherokee authorities on the technical ground that he was not a lineal descendant of an enrolled Cherokee citizen under act of December 8th, 1886. Appellants filed their petition before the Dawes commission on the 9th day of August, 1896, claiming to be Cherokee Indians by blood and lineal descendants of Shoe Boots, whose Indian name was Te-as-ki-yarga, a full-blood Cherokee Indian. Thereafter, on Oct. 7th, 1896, the Cherokee nation filed its answer alleging that the appellants have no ancestors who were ever citizens of the Cherokee nation since the removal of the Cherokees west of the Mississippi river, and that the mother of the appellant William Stephens was of negro blood. The application of appellants was rejected by the Dawes commission, and on January 16, 1897, they filed in this court their petition for an appeal for the decision of the said Dawes commission.

JOHN L. MCCOY testified for applicants as follows:

He knew the mother of William Stephens in 1827, in the old Cherokee nation, east of the Mississippi river; knew she was the acknowledged daughter of Shoe Boots, a full-blooded Cherokee Indian, whom he had frequently met at the national council; first

saw her at his father's house, who lived at the capital of the Cherokee nation. She came there from Kentucky to settle her  
 90 father's estate and receive her distributive share. The next time he saw her was at Tablequah, in 1874 or in 1875. Her son, William Stephens, was with her.

McCoy again testified before the Tehee court in 1882 as follows:  
 The first time he saw the children of William Stephens was at Tablequah; has no personal knowledge that William Stephens is the son of Mrs. Stephens, except what Mr. Stephens told him; think- Mrs. Stephens' name was Annie. When he saw Mrs. Stephens at Tablequah would suppose she was 70 or 75 years of age from her appearance. His information is that the mother of Mrs. Stephens was a white woman; was well acquainted with William Stephens, and if he is a son of Mrs. Annie Stephens, then he is a grandson of Shoe Boots. Witness is seventy-five years old and a resident and citizen of the Cherokee nation.

McCoy again testified before James Brizzolara in 1891 as follows:  
 That he is seventy-seven years of age, a Cherokee by blood, and a recognized citizen; has known William Stephens for nineteen years; knew the mother of William Stephens. She was a half-breed or a half-blood Cherokee Indian; knew her in old  
 91 Cherokee nation; met her there more than sixty years ago. She was recognized as a half-blood Cherokee Indian. He knew the mother and also the maternal grandmother of William Stephens. The grandfather of William Stephens — a full-blood Cherokee Indian and called Capt. Shoe Boots—Ootohseyahkee. He had often seen Capt. Shoe Boots, and he testified to facts within his own knowledge. The mother of William Stephens was the daughter of Capt. Shoe Boots, begotten in lawful wedlock.

WILLIAM ALLINGTON SHOE BOOTS testified as follows: Resides in Texas; is a Cherokee Indian by blood. His father was Shoe Boots; his Indian name was Te-as-ki-yarga. His mother's name was Clarinda Ellington, a white woman, who was born in Georgia. Went from Georgia to Kentucky with his mother and sister, his sister being the mother of William Stephens. His father sent them with a negro and some ponies to see his mother's family. I lived in Kentucky with claimant's mother, and his mother went from there to Ohio to live. William Stephens was the son of Robert Stephens, a white man. William Stephens' mother was my sister and Shoe Boots, Te-as-ki-yarga, was her father, and he was a full-blood Cherokee. Witness never went back to Georgia from Kentucky. Had one brother and sister. From Kentucky he went to  
 92 Illinois, married there, and then went to Texas; lived in the Cherokee nation a while, in Flint district, and have been here four or five times; came here and drew old-settlers' money in 1852. Stephens' mother is dead; died near Chetopah. It was understood that my father was a full-blood Cherokee. Recollect seeing his father, but was so little didn't remember much about

him; must have been two or three years old when his mother and himself went from Georgia to Kentucky; never saw his father after he left him in Georgia and went to Kentucky.

JOHN HARNED testified: 70 years of age; reside in Kilgore, Texas; have met appellant William Stephens; was acquainted with William Ellington; proved himself to be a Cherokee. In 1851 he drew annuity in the Cherokee government. His name should appear upon the roll of 1851. Have no knowledge of William Stephens being a relative of Shoe Boots. William Ellington, who is a son of Shoeboots, takes the maiden name of his mother, Ellington.

The evidence in his case shows his mother was a white woman.

The Cherokee commission, to whom was referred the case of William Stephens, made report to Hon. Joel B. Mayes, chief — Cherokee nation, and stated they found William Stephens to be a Cherokee Indian by blood; that he is a grandson of Te-as-ki-yarga and a nephew of William Ellington Shoeboots, but report conversely to his claim, on the ground that the evidence did not show him to be a lineal descendant of a Cherokee ancestor whose name appears upon the roll of the Cherokee citizens mentioned in seventh section of the act of December the eighth, 1886.

Acting under this report, he, said Joel B. Mayes, chief, sent a special message to the Cherokee council, in which he states that the reason for rejecting the claim of William Stephens was merely a technical one, his right to citizenship by blood being admitted by the commission. He concludes his message with the following statement: "No doubt his claim is a just one."

By agreement of counsel for appellant and the nation, all evidence taken before the Dawes commission, and all the affidavits, depositions, documentary papers, and sworn statements of persons filed with and attached to the typewritten argument of counsel for appellants in this cause, shall be read and considered in evidence by the master, subject to exceptions for incompetency and irrelevancy, and that the following certificate be admitted in evidence:

" UNION AGENCY, MUSCOGEE,  
INDIAN TERRITORY, *March 22nd, 1897.*

94 I, Dew M. Wisdom, United States Indian agent, certify that the names of, No. 112, William Shoe Boots; 113, James Shoe Boots; 114, Martha Shoeboots; 115, Isaac Shoe Boots; 116, Rebecca Shoe Boots; 117, Abraham Shoe Boots, appear on the Cherokee old-settler pay-roll as unclaimed shares, and that these names appear on the old-settler pay-roll of 1851.

(Signed)

DEW M. WISDOM,  
*U.S. Indian Agent."*

And also it is further agreed that all the affidavits, depositions, and documentary papers offered by the appellee in evidence in this case before the Dawes commission may be read and considered as evidence in this case, subject to objection for incompetency or irrelevancy.

The Cherokee nation submits the following evidence: JOHN COCHRAN testifies: When he first saw Capt. Shoe Boots and his negro wife they came to my grandmother's house, where my grandfather stayed, and when we went to the table to eat, the question was asked Shoe Boots if he had the woman for a slave, and he answered that he had her for his wife. After he had answered this question he was directed to another house for them to occupy, and they stayed there about two years. At that place was born a child 95 to Shoe Boots; it was a girl. In a few days he named it Kihuga. I do not recollect when Shoe Boots died. He never came to this country, but his wife came and lived on Honey creek, in Delaware district; was acquainted with one Tah-ha-ya-ha; was acquainted with Kihuga, the sister of applicant; was not acquainted with the younger ones. I am eighty-six years old; lived in the old nation, about fifty yards from Shoeboots. Kihuga was the first child of Shoe Boots and his negro wife. The twins were both boys. Applicant was about eight or nine years old when I saw him in Red Clay. I saw the applicant about three years ago on Honey creek, after he came West. The mother of applicant was living at that place and I only saw two children at that time. I think Captain Shoeboots and others came three or four years before I saw them at Honey creek. This boy that I saw at Honey creek with his mother was named William Shoe Boots. Captain Shoe Boots was of the Cherokee Indian tribe. Shoe Boots was my mother's uncle. He was of the Wolfe clan and could not talk any English; don't know anything of applicant's family; don't know when his mother died. Shoe Boots did not have any more negroes except his wife. She was rather tall and slender made.

96 EDMUND ROSS testified that he is a Cherokee Indian by adoption, 70 years old, and lived in Tahlequah; knew Capt. Shoe Boots back in the old nation, when he lived with Maj. Ridge; did not know his mother and father; knew John Shoe Boots. He was stolen out of the nation. They were free born. The first time I saw William Shoe Boots after that time was three or four years ago, and I recognized him to be the same William Shoe Boots that I knew in the old nation. It has always been my understanding that the applicant, William Stephens, had Cherokee blood.

NATHANIEL FISH testified for the nation as follows: Was acquainted with old Capt. Shoeboots. At the time he last saw Capt. Shoe Boots he had with him a wife wearing ornaments like those generally worn by Cherokees, such as earrings. She was a coal-black negro. Capt. Shoe Boots was about witness's complexion. What caused me to know that it was his wife and that she was a negro, when we were eating at the table he and his wife sat on the same side. I sat on the other side of the table, and when they were through eating they got up and went out to another house, where they usually stayed. From the statement I make here is 97 from what I know and saw that makes me believe he is a descendant of Shoe Boots. When I saw them they had no children. I cannot state that they had any children.



## Cross-examination :

Knew Capt. Shoe Boots in the old nation at Lolola ; lived about a day's journey from Shoe Boots ; was well acquainted with Shoe Boots ; would suppose he was sixty years old when witness first saw him ; was about four years after the Creek war when he saw him and supposed it was in the year 1814. Witness is eighty-eight or eighty-nine years old. Shoe-Boots was a full-blood Cherokee Indian ; could not talk any English. I never knew of his having any children. I do not know how old she was, but was a middle-aged woman when I was nineteen or twenty years old ; do not know how long they had been married. She grew up at Shoe-Boots' house. He had no negro children besides her. His English name was Shoe Boots and his Cherokee name was Tasekeyarga.

MARY FLEMING testified for the nation : 67 years old ; Cherokee by blood ; came to this country with the emigration from near Rome, Ga. ; knew two women, Lizzie and Polly Shoeboots. I knew their mother, and her name was Dolly ; knew Dolly back in the old nation. She belonged to my granny Ridge. Dollie's Cherokee name was Hakaya. She was a slave and belonged to my granny

98 Ridge. Lizzie and Polly were living to themselves when I went to California, in 1849. They were said to be the daughters of Captain Shoe Boots and were free. The two daughters married Cherokees. My recollection is that Capt. Shoe Boots freed these two girls. I never heard of William Shoe Boots until last June. I only knew one son that Dolly had.

WILLIAM SHOE BOOTS testified : 67 years old ; live in Tahlequah district ; one of the parties that has a case on file for citizenship in the Cherokee nation ; have seven children ; John Shoe Boots said to be my brother ; his name in Cherokee was Tarsekayakah. My mother was a black woman ; she had six children. My father died at Thompson's river, on Hightower.

Mrs. N. A. BIGBY testified : She is a resident of Flint district and a Cherokee Indian ; born in the old nation ; was living near my present place of residence in 1851 and 1852, and have lived here ever since ; remember the old-settler payment in 1851 ; remember an old man who stayed at our house by the name of Ellington or Shoeboots. He came here from Texas and drew the old-settler money for himself and family.

RUTH BEAM testified : 82 years old ; Cherokee Indian by blood ; daughter of Cliff Starr ; husband was John Beam, who emigrated from the old nation prior to the treaty of 1835-'6 ; was acquainted with a Cherokee Indian by the name of Shoeboots ; saw him at my father's residence in the old nation. He came to get my father to write a letter to his wife's people, asking them to bring his  
99 wife and children back home to the nation. His wife was a white woman, and that her father had carried her and her children back to the States, with a promise to bring them back to

the nation, and a failure on their part is the reason that he wanted to write as above stated; have been acquainted with William Stephens for five years, and my acquaintance with him and from what he says in regard to the Shoeboots family I am satisfied that he is the grandson of Capt. Shoeboots.

Page 114, Old Settlers' Pay-roll of 1851.

*Non-residents.*

No. of fam.	Heads of families and children.	No. of Ind.	Amount due each.	Amount of stoppages p'd claims.	Am't p'd Ind.	Total am't re- c't'd for.	Signatures.
1	William Shoe Boots. Isaac       "       " James       "       " Martha     "       " Rebecca    "       " Abraham    "       "	6	270.95  Total, 1,625.70	129.00	1,496.70	1,625.70	William Shoeboots.     Witness: S. M. Millard.

ALLEN GILBERT testified for the nation: He was acquainted with Robert Stephens in Ohio, the father of William Stephens. Robert Stephens was a white man, and he and his family were not known or recognized as Indians in that country. When I was a boy the said Robert Stephens, together with his family, moves from Ohio to Illinois. In 1864 he moved from Ohio to Kansas. For about ten years before he moved from Ohio he run a blacksmith shop about two miles from where William Stephens, the applicant, was born. In 1867 witness moved from Lynn county, Kansas, to the Cherokee nation, Indian Territory, and had resided in the Cherokee nation since that date. In March, 1870, he was in Chetopah, Kansas, and met William Stephens, and afterwards met the said Stephens at the Muscogee fair and again had a conversation with the said Stephens. The said William Stephens afterward moved down to the Creek nation and lived near Muscogee, and after he moved here he told me that he had filed his claim for citizenship in the Cherokee nation and was going to Texas to see his uncle about his proof. His uncle's name was William Ellington Shoeboots. I afterwards saw his uncle at Stephens' house and had a conversation with him, in which he stated that he reckoned William Stephens was his nephew, but that he had not seen his sister since they were young; have been back to Ohio since Stephens filed his application and have talked with my father and Thomas Googfellow and others in regard to Stephens' family being Cherokee Indians, and when I first mentioned it to them they were surprised, and laughed at the idea and said that there was something there, but that it was not Indian; that their hair was too kinky; that Bob Stephens' wife, the mother of William Stephens, was part black or darkey.

In rebuttal — the evidence offered by the Cherokee nation WILLIAM STEPHENS, the applicant, testified : He resides west of Coffeyville, in the Cherokee nation. He, together with his daughter, Mattie J. Ayers, and her children, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, have filed their petition for citizenship before the Dawes commission. In addition to the facts not clearly stated in the petition for citizenship states that his grandfather, Shoe Boots, whose Indian name was Teaskiyarga, was a full-blood Cherokee Indian ; that his grandmother was a full-blooded white woman, and that his father, Robert Stephens, was a full-blood white man ; that his mother was a half-breed Cherokee and a half white by blood ; that he was informed that Allen Gilbert, a white man, made an affidavit that he was of African descent. Witness testified that he never saw Allen Gilbert or knew him until eighteen years ago, when he first met him in the Cherokee nation, and that his mother never saw nor was acquainted with him at any time ; that he and Gilbert had some difference concerning a claim in the Cherokee nation, since which time Gilbert had been his inveterate enemy ; that he never until the charges made by Gilbert heard that  
 102 he or any members of his family, lineally or collaterally, directly or remotely, possessed African blood.

ABEL SHOE BOOTS testified : Live in Cooweescoowee district of the Cherokee nation, and is a son of William Shoe Boots, who was a half-breed Cherokee. His father's mother was a white woman. His father's name and that of five of his children are on the old settlers' roll of 1851. My father was the uncle of the applicant Stephens and always recognized the relationship existing between them.

C. C. AYERS testified that he married the petitioner Mattie J. Ayers, who was the daughter of William Stephens. He has seen the mother of William Stephens, who lived with Stephens at the time of his marriage. She had every appearance of being a half-blood Cherokee ; has known Allen Gilbert for fifteen or twenty years. A year ago Gilbert was at Tahlequah, and he and Gilbert talked over the Stephens case, and Gilbert volunteered to assist him in the matter of citizenship, and said there was no doubt of the genuineness of the Stephens claim.

Since that time Stephens and Gilbert had a difference over the land matter.

Captain WILLIAM JACKSON testified that he knows Rothchild, the cattle-buyer. Stephens and Rothchild got into a quarrel about some cattle, and Rothchild called Stephens "a d—d old nigger."

He met Stephens' mother also at Tahlequah, and she told  
 103 him her maiden name was Ellington, and that she had a brother William Ellington Shoe Boots. She did not look like she had any colored blood in her. He also saw William Ellington Stephens, who told him that Mr. Stephens was his sister.

R. F. WYLIE testified he was attorney for the nation before the citizenship commission in 1888, when the Stephens case was before the commission. The proof showed that Captain Shoe Boots, the alleged grandfather of William Stephens, had two wives at different times. His first wife was a white woman, and by this woman he thinks the proof shows he had four children. One of the boys was named William Ellington Shoe Boots. The proof before said commission showed that the mother of William Stephens was a full sister of this William Ellington Shoe Boots, whose name appears on the old-settler roll of 1851. After the first wife of Shoe Boots went back to Kentucky, he took a nigger woman for his wife. He does not recollect how many children she had; perhaps three or four. It appeared that old Capt. Shoe-Boots had two families, one by a white woman and another by a negro woman. The commission was convinced that the mother of William Stephens was a full sister of William Ellington Shoe Boots.

104      Reviewing all of the above evidence, I am forced to the conclusion that the old Capt. Shoe Boots, Teaskiyarga, was a full-blood Cherokee Indian; that he married a full-blood white woman by the name of Clarinda Ellington, and there were born to them three children as the issue of the said marriage, two sons and one daughter, one of his sons being William Ellington Shoeboots, who afterwards adopted his mother's maiden name, William Ellington. One of the witnesses thinks the daughter's name was Annie, but others say her name was Sarah. The other son was named John Shoe Boots. The daughter Sarah or Annie was the mother of the appellant William Stephens, and was a half-blood Cherokee Indian.

I find from the sworn petition that it is the history of the Shoe Boots family that Captain Shoe Boots, Teaskiyarga, captured his wife in Kentucky and carried her to Georgia, and she was a white girl named Clarinda Ellington, and, as above stated, there were born to them three children. The relatives of Clarinda Ellington, upon learning of her whereabouts, went to old Shoe Boots, and, upon a promise to return them, prevailed upon him to permit his wife, Clarinda, and her children to visit her relatives and the home of her childhood in Kentucky. They never returned to their

105      husband and father. Sarah afterwards moved to the State of Ohio and married Robert Stephens, a white man, and there was born to them this applicant, William Stephens. William Stephens came to this country over a quarter of a century ago, where he has continuously resided in the Cherokee nation. He came here under an invitation issued by Chief Downing for all non-resident Cherokees to come to the Cherokee nation and make it their home. Soon after he came he made application for his mother and for himself to be readmitted as citizens of the nation. The commission who heard this case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application upon a technical ground. Upon this report Chief Mayes, on a message to the general council, stated his confidence in

the honesty and genuineness of the claim of the applicant and wanted the council to pass an act recognizing applicant as a full citizen, but somehow this was never done.

I find, as above stated, that William Stephens came here over twenty-five years ago, and has in good faith sought to become a citizen of the Cherokee nation, relying solely upon the justness of his cause and his unquestioned Cherokee blood to readmit  
106 him as a citizen. He has improved considerable property in the Cherokee nation, and has continuously lived here as a Cherokee citizen, and at one time was permitted to vote in the Cherokee elections.

The Cherokee nation does not deny the fact that the appellant William Stephens has Cherokee blood, but contends that the mother of the said Stephens was of African or negro blood, and by reason of this fact should not be admitted to citizenship.

I do not think it necessary to comment upon this as a legal question in the case, but I am convinced from a great preponderance of the evidence that the mother of Stephens had not a drop of negro blood in her veins; but, to the contrary, she was one-half white and one-half Cherokee, as claimed by the appellant Stephens, thus making Stephens a quarter Cherokee Indian and three-quarters white.

I find that Mrs. Mattie J. Ayers is a daughter of William Stephens, thus making her one-eighth Cherokee Indian and seven-eighths white, and there was born to the said Mattie J. Ayers in lawful wedlock the following living children: Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers.

I therefore conclude that William Stephens and his  
107 daughter, Mattie J. Ayers, and her children, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, are all Cherokee Indians by blood and untainted with any negro or African blood.

Your honor can see from this report that it has been a long and tedious job, and I respectfully ask you to allow me a reasonable master's fee.

Respectfully submitted.

R. P. DE GRAFFENRIED,  
*Special Master.*

(Endorsed as follows:) Filed June 26th, 1897. Jas. A. Winston, clerk.

108 (DEC. 16, 1897.)

WILLIAM STEPHENS, MATTIE J. AYERS, JACOB SHERMAN	} # 213.
Ayers, Mattie Ayers, Appellants,	
<i>vs.</i>	
THE CHEROKEE NATION, Appellee.	

Come the above-named appellants, William Stephens, Mattie J. Ayers, Jacob Sherman Ayers, and Mattie Ayers, by Grace & Forrester, Esqs., their solicitors, and come the appellee, by its attorney,

W. T. Hutchings, Esq., its solicitor, and this cause having been heretofore submitted to the court upon application for citizenship for said appellants and answer and demurrer of the appellee and the depositions and documentary evidence for both parties on file in the case and the master's report, and the court, now being well and sufficiently advised in the premises, doth find the issues for the appellee, The Cherokee Nation.

It is therefore by the court considered, ordered, adjudged, and decreed that the said above-named appellants, applicants for citizenship in the Cherokee nation, be, and they and each of them are hereby, refused admission and enrollment as citizens of said nation, and the judgment and decision of said United States commission is in all things approved and affirmed, and the application for citizenship herein is dismissed at cost of appellants, and that execution issue therefor; to which action of the court in refusing to admit and enroll the applicants and each of them as citizens of the Cherokee nation they and each of them at the time excepted.

(DEC. 17, 1897.)

WILLIAM STEPHENS, MATTIE J. AYERS, JACOB SHERMAN	} # 213.
Ayers, Mattie Ayers, Appellants,	
vs.	
THE CHEROKEE NATION, Appellee.	

The appellants herein are given until Jan'y 17, 1898, to file motion for rehearing herein.

110 (JAN'Y 17, 1898.)

WILLIAM STEPHENS, MATTIE J. AYERS, JACOB SHERMAN	} # 213.
Ayers, Mattie Ayers, Appellants,	
vs.	
THE CHEROKEE NATION, Appellee.	

Come the parties as heretofore, and appellants file their motion for a rehearing herein, and the counsel for both the parties hereto argued orally said motion.

In the United States Court for the Indian Territory, Northern District, at Muskogee, Dec. Term, A. D. 1897.

WILLIAM STEPHENS ET AL.	}
vs.	
THE CHEROKEE NATION.	

Come the appellants in the above-entitled cause, by their attorneys, Grace and Forrester, and move the court to vacate and set aside the judgement in this case, rendered by this court on a former day of this term, and to grant a new trial in said case—

First. Because the finding and judgement of the court upon and touching the matters of fact and law in controversy are contrary to



the evidence in the record and in conflict with the law of the case applicable to the facts proven.

Second. Because the finding on the facts and the judgement of the court are in controvention of the provisions of the Constitution of the United States and in conflict with the laws of the land,  
 111 and because the finding on the evidence and the judgement of the court contravene and render ineffective the treaties now subsisting, made by and between the lawful authorities of the United States and the lawful tribal authorities of the Cherokee nation.

Third. Because the judgement of the court herein in its scope and effect deprives these appellants of their interest and inalienable rights as Indians by blood of the Cherokee tribe.

Fourth. Because the judgement of the court in this case in its scope and effect deprives these appellants without the one process of law of their inherent and inalienable interest in the land and moneys now in possession of the Cherokee nation and owned in common, share and share alike, by all the members of the Cherokee tribe residing in the Cherokee nation.

Fifth. Because the judgement of this court affirms a pretended judgement of the commission to treat with the five civilized tribes, which commission was created and existed at the time of the rendition of its said judgement by virtue of act of the Congress of the United States on the 10th day of June, 1896, and which said act of Congress, pretending and assuming to create said commission, was and is in controvention of the Constitution of the United States, and  
 112 on that reason was and is null and void and wholly insufficient to authorize and empower the said commission to treat with the five civilized tribes, to act and perform judicial functions in a lawful manner.

Sixth. By virtue of the judgement of this court, affirming the judgement theretofore rendered by the said commission to treat with the five civilized tribes, these appellants have been denied the equal protection of the laws of the land, and have thereby been deprived of their natural and lawful rights to tribal citizenship and of their common interest in the Cherokee tribal moneys and property, amounting in aggregate value to more than \$4,000 each; this without one process of law.

Seventh. Because of other errors involved in said judgement.

Eighth. Because the court had no jurisdiction of the subject-matter of this cause.

GRACE AND FORRESTER,  
*Att'ys for Appellants.*

(Endorsed as follows:) Filed Jan. 7, 1898. Jas. A. Winston, clerk.

113

(JUNE 23, 1898.)

WILLIAM STEPHENS, MATTIE J. AYERS, JACOB SHERMAN }  
 Ayers, Mattie Ayers, Appellants, } # 213.  
 vs.  
 THE CHEROKEE NATION, Appellee.

On this day the court doth overrule the motion of the above-named appellants for a rehearing herein. It is therefore ordered, considered, adjudged, and decreed by the court that said appellants be not admitted and enrolled as citizens of the Cherokee nation, Indian Territory, and that their petition be, and the same is hereby, dismissed; to which action of the court appellants then and there excepted.

114

WM. STEPHENS ET AL. }  
 vs. } # 213.  
 CHEROKEE NATION.

Mr. R. P. De Graffenried, special master, to whom this case was referred, submits the following report:  
 (For master's report see 88.)

By the COURT: The report in this case is very full, and it seems to clearly set forth all the facts in the case. It covers thirteen pages of typewritten matter.

There is a contention as to whether the principal claimant in this case was of Cherokee blood or whether his mother was or was not a negro. The master finds, however, and reports, from a great preponderance of the evidence, that the mother of Stephens had not a drop of negro blood in her veins; but, on the contrary, that she was one-half white and one-half Indian, as is claimed by the principal claimant in this case. The master finds, therefore, that William Stephens is one-fourth Indian and three-fourths white. It is unnecessary to recapitulate the evidence upon which this conclusion is based. The court accepts the finding of the master as establishing conclusively the fact as stated. It appears from the evidence set forth in the report of the master that the principal claimant, William Stephens, was born in the State of Ohio; that his father, Robert Stephens, was a white man and a citizen of the

United States; that his mother's name was Sarah, and that  
 115 she was a daughter of William Ellington Shoe Boots, and that her father was known as Captain Shoe Boots in the old Cherokee nation. It appears that his mother was born in the State of Kentucky, and that she moved afterwards to the State of Ohio, where she was married to Robert Stephens, father of the principal claimant in this case. William Stephens came to the Cherokee nation, Indian Territory, in the year 1873, and has resided in the Cherokee nation since that time.

Soon after he came to the Cherokee nation he made application for his mother and himself to be readmitted as citizens of the Cherokee nation. The master states as follows: "The commission who

heard this case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application upon a technical ground. Acting upon this report, Chief Joel B. Mayes, in a message to the council, stated that he was convinced of the honesty and genuineness of the claim of the applicant, and wanted the council to pass an act recognizing him as a full citizen, but somehow this was never done."

It is further stated that he has improved considerable property in the nation, and has continuously lived there as a Cherokee  
116 citizen, and at one time was permitted to vote in a Cherokee election. It appears from the evidence in the case that this applicant comes within the following provision of the Cherokee constitution: "Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease; Provided, nevertheless, that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on memorializing the national council for such readmission." There was a provision precisely similar to this in the constitution of the old Cherokee nation as it existed prior to the removal of the tribe west of the Mississippi river. The provision just quoted is from the constitution of the Cherokee nation as now constituted.

The mother of the principal claimant, as heretofore stated, was born in the State of Kentucky, and from that State she moved to the State of Ohio, where she married the father of the principal claimant in this case. Her status was then fixed as that of one who had taken up a residence in the States. She had ceased to be a citizen of the Cherokee nation, and she cannot be readmitted to citizenship in the nation except by complying with the con-  
117 stitution and laws of the nation as declared by the Supreme Court in the case of The Eastern Band of Cherokee Indians against The Cherokee Nation and The United States.

The master states the claimant was rejected by the commission of the Cherokee nation upon a technical ground. The ground upon which the decision was based was that the names of the claimants did not appear upon any of the authenticated rolls of the present Cherokee nation or of the old Cherokee nation. The commission which passed upon his application was created under the act of the council of December 8, 1886.

Robert Stephens, the father of the principal claimant in this case, was a citizen of the United States and a resident of the State of Ohio, and the mother of the claimant William Stephens had abandoned the Cherokee nation and ceased to be a citizen thereof. Therefore the principal claimant at the time of his birth was a citizen of the United States, taking the status of his father. I doubt whether he could become a citizen of the Cherokee nation without the affirmative action of the Cherokee council. The evidence fails to disclose that he has ever applied to any of the commission that had jurisdiction to admit him as a citizen of the Cherokee nation. The

commission to which he did apply for enrollment as a citizen of the Cherokee nation having held that as his name did not appear upon any of the Cherokee rolls of citizenship, his application was rejected. He never having been admitted to citizenship as required by the constitution and laws of the Cherokee nation, the judgement of the United States commission rejecting this case is affirmed, and the application of the claimants to be enrolled as citizens of the Cherokee nation is denied.

On the 29th day of Aug., 1898, there was filed in the office of the clerk of said court, at Muscogee, the petition for appeal in said cause, which is in words and figures as follows, to wit :

*Petition for Appeal.*

In the United States Court in the Indian Territory, Northern District, at Muscogee, I. T.

WILLIAM STEPHENS, MATTIE J. AYERS, STEPHEN G. AYERS, JACOB S. AYERS, and Mattie Ayers

vs.

THE CHEROKEE NATION, in the Indian Territory.

The plaintiffs above named, to wit, William Stephens, Mattie J. Ayers, Stephen G. Ayers, Jacob S. Ayers, and Mattie Ayers, conceiving themselves aggrieved by the orders, judgements, and decrees entered herein on the 16th day of December, 1897, and the 23rd day of June, 1898, in the above-entitled case, doth hereby appeal from said orders, judgements, and decrees to the Supreme Court of the United States, at Washington, D. C., and pray that this appeal may be allowed and transcript of the record and proceedings and papers on which said order-, judgement-, and decree-~~was~~ made, duly authenticated, may be sent to the Supreme Court of the United States pursuant to an act of Congress entitled "An act making appropriations for contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1898, and for other purposes," approved July 1st, 1898, and therein providing for appeals to the U. S. Supreme Court in citizenship and other cases from the judgements of the U. S. courts in the Indian Territory. The order- and decree- herein is erroneous in this :

(1.) The court erred in not admitting said parties to citizenship in the Cherokee nation.

(2.) The court erred in refusing them citizenship.

(3.) The act of Congress of June 10, 1896, under which court acted, is void.

(4.) The court finds that plaintiffs were Indians; therefore they should be enrolled as citizens.

(5.) Because plaintiffs had not been admitted by Cherokee authority, having been born out of the Indian Territory.

These errors are more fully set forth in specification of errors.

JAMES B. FORRESTER,  
*Solicitor for Plaintiffs.*

And now, on this 2d day of September, 1898, it is ordered that the appeal in this case be allowed as prayed for.

WILLIAM M. SPRINGER,  
*Judge of the U. S. Court in the Indian Territory,  
for the Northern District Thereof.*

(Endorsed as follows:) Filed Aug. 29, 1898. Jas. A. Winston, clerk.

121 On the 29th day of Aug., 1898, there was filed in the office of the clerk of said court, at Muscogee, the assignment of errors in said cause, which is in words and figures as follows, to wit:

*Assignment of Errors.*

WILLIAM STEPHENS, MATTIE J. AYERS, STEPHEN G. AYERS, } Jacob S. Ayers, Mattie Ayers, } vs. THE CHEROKEE NATION. }
--

On this the 29th day of August, 1896, come the above-named appellants or complainants herein, by their solicitor, J. B. Forrester, Esq., and say that in the record and proceedings in the above-entitled cause there is manifest error in this: That the orders and judgments and decrees rendered by the U. S. court in the Indian Territory, northern district, on the 16th day of December, 1897, and June 23, 1898, are erroneous for the following reasons, to wit:

(1.) The court erred in refusing to admit and enrol the above-named complainants as citizens of the Cherokee nation, in the Indian Territory, under the evidence submitted to the court in the case.

122 (2.) The court erred in not admitting said complainants as citizens in the Cherokee nation under the proof adduced in the case.

(3.) The act of Congress approved June 10, 1896, under which the court acted in this case, was unconstitutional and void, Congress having no legal power to confer jurisdiction on the United States commissioners to the five civilized tribes, mentioned in said act, to try and determine the citizenship of these parties.

(4.) The court erred in not admitting and enrolling as citizens of the Cherokee nation these complainants, when the evidence showed and the court so found that they were Indians by blood.

(5.) The court erred in holding that because said William Stephens, the father and grandfather of the other complainants, was born and raised out of the Indian Territory and had never been admitted as a citizen by the Cherokee nation he was not entitled to citizenship in the Cherokee nation.

Wherefore said complainants pray that the orders, judgements, and decrees of said U. S. court in the Indian Territory, for the northern district thereof, be reversed, and that the said court be directed to set aside and annul said orders, judgements, and  
 123 decrees so entered in said cause on the 16th day of December, 1897, and 23rd day of June, 1898, and that it be ordered to enter a judgement and decree granting these complainants the relief prayed for in their original complaint or application for citizenship in the Cherokee nation, and for all equitable and general relief.

JAMES B. FORRESTER,  
*Solicitor for Plaintiffs.*

(Endorsed as follows:) Filed Aug. 29, 1898. Jas. A. Winston, clerk.

124

*Bond.*

Know all men by these presents that we, William Stephens, Mattie J. Ayers, Stephen G. Ayers, Jacob S. Ayers and Mattie Ayers, and C. C. Ayers, are held and firmly bound *with* the Cherokee nation in the full and *first* sum of \$—, — dollars, to be paid to the said Cherokee nation; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seal- and dated this — day of August, 1898.

Whereas lately, at the — term, 1897, of the U. S. court in the Indian Territory for the northern district, holden at Muscogee, I. T., in suit pending in said court between William Stephens, Mattie J. Ayers, Stephen G. Ayers, Jacob S. Ayers, and Mattie Ayers, plaintiffs, and The Cherokee Nation, defendant, an order, judgement, and decree was rendered against said plaintiffs denying them and each of them citizenship in the Cherokee nation, and the said plaintiffs have obtained an appeal to the Supreme Court of the United States to reverse said order, judgement, and decree in the  
 125 aforesaid suit, and a citation directed to the said Cherokee Nation, — and admonishing it to be and appear in the Supreme Court of the United States, at Washington, D. C., on the — Monday in —, 1898:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said appeal to effect and answer all damages



and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

WILLIAM STEPHENS,  
MATTIE J. AYERS,  
STEPHEN G. AYERS,  
JACOB S. AYERS,  
MATTIE AYERS,  
By JAS. B. FORRESTER,  
*Their Attorney.*  
C. C. AYERS.

(O K.

WILLIAM T. HUTCHINGS,  
*Att'y for Cherokee Nation.)*

Approved by—

WM. M. SPRINGER,  
*Judge U. S. Court, Indian Territory, Northern District.*

(Endorsed as follows:) Filed Sep. 10, 1898. Jas. A. Winston,  
clerk.

126 On the 10th day of September, 1898, there was filed in the  
office of the clerk of said court, at Muscogee, I. T., the cita-  
tion in said cause, which is in words and figures as follows, to wit:

*Citation.*

The United States of America to the Cherokee Nation, Greeting:

You are hereby cited and admonished to be and appear in the  
Supreme Court of the United States, at Washington, D. C., within  
thirty days from this date, pursuant to a writ of error filed in the  
clerk's office of the United States court in the Indian Territory for  
the northern district, at Muscogee, I. T., wherein William Stephens,  
Mattie J. Ayers, Stephen G. Ayers, Jacob S. Ayers, and Mattie Ayers  
are appellants and you are defendant in error or appellee, to show  
cause, if any there be, why the order, judgment, and decree rendered  
against the said appellants, as in said writ of error mentioned,  
should not be corrected and why speedy justice should not be done  
the parties in that behalf.

Witness the Honorable William M. Springer, judge of the  
127 United States court in the Indian Territory for the northern  
district thereof, this 2d day of September, A. D. 1898.

WM. M. SPRINGER,  
*Judge U. S. Court in the Indian Territory  
for the Northern District.*

Service accepted and acknowledged this 9th day of Sept., 1898.

WILLIAM T. HUTCHINGS,  
*Solicitor for Defendant.*

(Endorsed as follows:) Filed Sep. 10, 1898. Jas. A. Winston,  
clerk.

128 UNITED STATES OF AMERICA, }  
*Indian Territory, Northern Judicial District,* } ss:

I, James A. Winston, clerk of the United States court in the Indian Territory for the northern district thereof, hereby certify that the foregoing writings annexed to this certificate are true, correct, and complete copies of the originals remaining of record in my office and constitute a true copy of the record and of the assignment of errors of all proceedings in the case entitled William Stephens *et al. vs.* The Cherokee Nation, Indian Territory.

In witness whereof I have hereunto set my hand and the seal of said court this the twenty-sixth day of September, one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

{ Seal United States Court in the Indian Territory, }  
 Northern District, Muscogee.

JAMES A. WINSTON, *Clerk,*  
 By N. S. YOUNG, *Deputy Clerk.*

Endorsed on cover: Case No. 17,008. Indian Territory U. S. court. Term No., 423. William Stephens, Mattie J. Ayers, Stephen G. Ayers, Jacob S. Ayers, & Mattie Ayers, appellants, *vs.* The Cherokee Nation. Filed October 3rd, 1898.



1900

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 433.

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THE CHOCTAW NATION, APPELLANT,

vs.

F. R. ROBINSON.

---

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
TERRITORY.

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FILED OCTOBER 24, 1898.

(17,038.)

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(17,038.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 453.

THE CHOCTAW NATION, APPELLANT,

*vs.*

F. R. ROBINSON.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
TERRITORY.

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a UNITED STATES OF AMERICA, }  
 Central District, Indian Territory. }  
 F. R. ROBINSON, Plaintiff, }  
 vs. } Number 157.  
 CHOCTAW NATION, Defendant, }

*Proceedings in Equity.*

Before the Hon. Wm. H. H. Clayton, U. S. judge for the central district of the Indian Territory in the above-styled cause.

Appealed to the Supreme Court of the United States.

*Transcript.*

1 (Application for enrollment.)

To the Hon. United States commission :

Your undersigned petitioner would respectfully represent unto your honors that I am a white man by blood ; that on September 19th, 1873, I obtained a marriage license from the regular authorized clerk of Blue county, Choctaw nation, & thereby complying in every respect with the Choctaw laws, & on the 21st day of September, 1873, I was married to Salina Durant, a daughter of Rev. D. D. Durant, of Durant, Ind. Ter., who was both Choctaw and Chickasaw by blood.

That I had five children by said marriage ; that my wife, Salina Durant, née Robinson, died April 1st, 1884, and that on the 10th day of August, 1884, I married a white woman by the name of Arazona Carter, and have lived with her since. I have exercised the rights of an intermarried citizen, but have never participated in any of the annuities. Therefore I ask your honor to have me enrolled as a intermarried citizen, so I can share in what rights you accede- them.

Respectfully,

F. R. ROBINSON.

Subscribed & sworn to before me this 7 day of August, 1896.

W. A. DURANT,

*Notary Public.*

Endorsed: F. R. Robinson vs. Choctaw Nation. Filed Sept. 7, 1896. A. S. McKennon, com's Filed Feb. 22, 1897. P. B. Stoner, clerk.

2 (The following affidavits and certificates were pin-ed to the original application and were filed in this office therewith:)



CHOCTAW NATION, }  
 County of Blue. }

In Term of County and Probate Court, July 7th, 1894.

Hon. F. R. Robinson, Greeting:

This is to certify that you are appointed as election judge, to be held at Durant precinct on the 5th day of August, 1894.

F. E. FOLSOM,  
 County and Probate Clerk, Blue County, C. N.

(Marriage License.)

CHOCTAW NATION, }  
 Blue County. }

To all to whom it may concern:

Whereas Fredrick Robinson, a citizen of the United States, this day applying for license in behalf of himself for the express purpose of being joined together in the bonds of wedlock by and between Selina Durant, a citizen of said nation and county; therefore, being satisfied that the said Fredrick Robinson has lived in said nation the time required by law, I do hereby give the said Fredrick Robinson license for the purpose above stated.

Given under my hand and seal this Sept. 19th, 1873.

CALEB IMPSON,  
 Circuit Clerk, C. N.

3

(Affidavit of Pier Durant.)

CENTRAL JUDICIAL DISTRICT, }  
 Indian Territory. }

Before me, W. A. Durant, a notary public in and for the district and Territory above mentioned, personally appeared Pier Durant, to me well known, and, after being duly sworn, on oath says that he was well acquainted with Salina Robinson, formerly the wife of said F. R. Robinson; that they lived at Durant; that said Salina Robinson, was a Choctaw & Chickasaw Indian by blood, and F. Robinson were lawfully married and lived together until her death; that said F. R. Robinson has always been recognized as a citizen & has always had all the rights of an intermarried citizen given him; that affiant is 38 years old and resides at Durant and is a Choctaw by blood.

PIER DURANT.

Subscribed and sworn to before me this the 7th day of August, 1896.

W. A. DURANT,  
 Notary Public.

(Affidavit of D. D. Durant.)

CENTRAL JUDICIAL DISTRICT, }  
Indian Territory. }

Before me, W. A. Durant, a notary public in and for the district and Territory above mentioned, personally appeared D. D. Durant, to me well known, and, after being duly sworn, on oath says that he was well acquainted with Salina Robinson, formerly the wife of said F. R. Robinson; that they lived at Durant; that said Salina Robinson was a Choctaw & Chickasaw Indian by blood, and that said Salina Robinson and F. R. Robinson were lawfully married and lived together until her death.

That said F. R. Robinson has always been recognized as a citizen and has always had all the rights of an intermarried citizen given him.

That affiant is about 56 years old and resides at Durant  
4 and is a Choctaw by blood.

D. D. DURANT.

Subscribed and sworn to before me this the 7th day of August,  
1896.

W. A. DURANT,  
Notary Public.

5 (Answer.)

In the Matter of the Claim of F. R. ROBINSON for Citizenship in the  
Choctaw Nation.

Now comes the Choctaw Nation, by its lawful attorneys, and  
says:

First. That this honorable commission has no power and jurisdiction to hear and determine the issues herein involved, because the law creating such commission is unconstitutional and void.

Second. The Choctaw Nation enters its protest against the hearing of this cause, because the methods of procedure adopted by this commission are unjust, unfair, and productive of great fraud and wrong, and the form and method of trial prescribed by said commission are contrary to the Constitution and laws of the United States.

Third. The Choctaw Nation protests against a hearing and determination of this cause, for the reason that the time prescribed by said commission within which this nation must answer and adduce its proof is so limited as to amount to a denial of justice.

Fourth. The Choctaw Nation further says that this commission ought not to entertain this cause, for the reason that it does not appear that the applicant herein has applied for citizenship to the legally constituted tribunal designated by the Choctaw nation for the trial of questions of disputed citizenship.

Fifth. Defendant says that the evidence adduced by the claimant

in this case is not sufficient to establish his citizenship in the Choctaw nation.

Sixth. Defendant says that this commission has no power to enroll the applicant herein, because it appears that said applicant claims to be a citizen of the Choctaw nation by intermarriage, and it does not appear that his rights as such intermarried citizen have been disputed by the Choctaw nation.

Seventh. Defendant says that the applicant herein should not be enrolled, because he has not shown by his evidence that he has not forfeited his rights as such citizen by abandonment or remarriage.

Eighth. And, not waiving the defenses heretofore set out, defendant for further answer herein says:

That there is no evidence to show that this claim has been disputed by the Choctaw nation.

THE CHOCTAW NATION,  
By STUART, GORDON & HAILEY,  
*Its Attorneys.*

Endorsed: Claim of F. R. Robinson for Choctaw citizenship. Filed Sept. 19, 1896. A. S. McKennon, com'r. Filed Feb. 22, 1897. P. B. Stoner, clerk.

6

*(Judgment of Commission.)*

Commissioners: Henry L. Dawes, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Cabaniss, Alexander B. Montgomery. H. M. Jacoway, secretary.

DEPARTMENT OF THE INTERIOR,  
COMMISSION TO THE FIVE CIVILIZED TRIBES,  
FORT SMITH, ARK., Dec. 2, 1896.

F. R. ROBINSON }  
v. } 675.  
CHOCTAW NATION. }

Filed Sept. 7, 1896. Answer filed. Application of F. R. Robinson as an intermarried citizen. Granted.

W. A. DURANT, *Durant, I. T.*

I, H. M. Jacoway, Jr., secretary, do hereby certify that the above and foregoing is a true and correct copy of Choctaw Record C, page 312, of the commission to the five civilized tribes.

Given under my hand and official signature this the 12 day of February, 1897.

H. M. JACOWAY, JR., *Secretary,*  
By HENRY STROUP, *Act.*

Endorsed: Filed Feb. 22, 1897. P. B. Stoner, clerk.

7

*(Petition for Appeal.)*

In the United States Court for the Central District of the Indian Territory, South McAlester.

F. R. ROBINSON	}	Petition for Appeal.
<i>vs.</i>		
CHOCTAW NATION.		

Your petitioner, The Choctaw Nation, represents that heretofore, on the — day of —, 1896, the plaintiff, F. R. Robinson, a white man and a non-citizen of the Choctaw nation, presented his petition to the Dawes commission to be admitted as a citizen of the Choctaw nation by virtue of a marriage with Sallie Durant, a Choctaw Indian woman by blood, which marriage took place in the year 1873; that thereafter, on the 2nd day of December, 1896, the said Dawes commission erroneously admitted the said Robinson to be a citizen of the Choctaw nation. Your petitioner alleges that Sallie Durant Robinson died after her marriage with the plaintiff, F. R. Robinson, and that thereafter, in 1884, the said F. R. Robinson was married to Arizona Carter, a white woman and not a citizen of the Choctaw nation, whereby, as your petitioner alleges, the rights of the said F. R. Robinson as a citizen of the Choctaw nation were forfeited by virtue of the laws of the Choctaw nation.

Wherefore your petitioner, making this its appeal, prays that the order of the said Dawes commission admitting the said plaintiff to citizenship be set aside, and that the said F. R. Robinson, by order of this court, be declared to be a non-citizen of the Choctaw nation.

WM. M. CRAVENS,  
STUART, GORDON & HAILEY,  
*Attorneys for Choctaw Nation.*

Endorsed: F. R. Robinson *vs.* Choctaw Nation. Petition for appeal. Filed Jan. 30, 1897. P. B. Stoner, clerk.

8

*(Notice of Appeal.)*

In the United States Court for the Central District of the Indian Territory, at South McAlester.

F. R. ROBINSON, Plaintiff,	}	Notice of Appeal.
<i>vs.</i>		
THE CHOCTAW NATION, Defendant.		

To F. R. Robinson, the above-named plaintiff:

You are hereby notified that an appeal has been taken from the judgment of the Dawes commission in the above-entitled cause, and petition for said appeal has been filed in the United States court at South McAlester.

THE CHOCTAW NATION,  
By WM. M. CRAVENS AND  
STUART, GORDON & HAILEY,  
*Its Attorneys.*

INDIAN TERRITORY, }  
*Central District.* }

James Elliott, being first duly sworn, states upon oath tha- he is not interested in this cause; that he was present and saw a true copy of the above notice sent by registered mail from South McAlester to the above-named plaintiff, at Durant post-office, on the 9 day of February, 1897.

JAS. ELLIOTT.

Subscribed and sworn to before me on this 9th day of February, 1897.

JOE HILLMAN,  
*Notary Public.*

[SEAL.]

Endorsed: F. R. Robinson vs. Choctaw Nation. Notice of appeal. Filed Feb. 10, 1897. P. B. Stoner, clerk.

9

*(Motion for Addition- Testimony.)*

In the United States Court for the Indian Territory, Central Judicial District.

FREDRICK ROBINSON, Appellant,	} Motion.
<i>vs.</i>	
THE CHOCTAW NATION, Appellee.	

Comes now the appellant, by his attorney, W. A. Durant, and moves the court to allow the introduction of new and additional evidence to that filed before the Dawes commission, to wit, a certificate of enrollment, hereto attached, and, for reason why he should be allowed to file said evidence, saith that at the time his case was passed upon by the Dawes commission the enrollment had not been made by the Choctaw nation; that he was only enrolled since the Dawes commission acted as aforesaid, and that it was impossible to have procured such evidence at that time.

Wherefore he prays that he be allowed to use same now in his appeal.

W. A. DURANT,  
*Attorney for F. R. Robinson, Appel't,*  
 By W. L. RICHARDS, *Co-council.*

W. L. Richards states on oath that the facts set forth in the foregoing motion *be* true.

Subscribed and sworn to before me this — day of of June, 1897.

(Attached to said motion and filed with it is the following:)

Executive office, Choctaw nation; Green McCurtain, principal chief.

SAN BOIS, I. T., June 2, 1897.

This is to certify that Fredrick Robinson (age 40 yrs.) is regularly enrolled on the revised rolls of the Choctaw nation as a citizen by intermarriage of said Choctaw nation, living in Blue county.

10 Given under my hand and the great seal of the Choctaw nation on this 2nd day of June, 1897.

[SEAL.]

WALLACE BOND,  
Sec'y to Principal Chief, C. N.

Endorsed on back of motion: Fredrick Robinson vs. Choctaw Nation. Motion. Filed in open court June 9, 1897. E. J. Fannin, clerk.

11

(Motion for Additional Testimony.)

Before the United States Court for the Central District of the Indian Territory.

FRED ROBINSON, Appellant,	} Motion.
vs.	
CHOCTAW NATION, Appellee.	

Comes now the appellant, Fred Robinson, and moves the court to allow the introduction of the following testimony, in addition to that introduced on the original trial of this cause, namely, a certificate from the chairman of the enrolling commission of the Choctaw nation to the effect that the appellant was and is enrolled by said commission as a citizen of the Choctaw nation.

That — could not by any diligence have procured and introduced said evidence on the original trial of said cause, because the said enrolling commission of the Choctaw nation did not enroll the appellant until after the time expired for the filing of proof with the Dawes commission on the original trial of this cause.

W. A. DURANT,  
Att'y for Appellant.

W. A. Durant states on oath that he is attorney for the above-named appellant, and that the facts therein are true.

W. A. DURANT.

Subscribed and sworn to before me this 29 day of March, 1897.

P. B. STONER, Clerk.

Endorsed: F. R. Robinson vs. Choctaw Nation. Filed March 29, 1897. P. B. Stoner, clerk.

12

*(Report of Special Master.)*

F. R. ROBINSON, Plaintiff,	} Report of Special Master in Chancery.
<i>vs.</i>	
THE CHOCTAW NATION, Defendant.	

This cause was duly filed before the Dawes commission September 7th, 1896, the plaintiff claiming citizenship by virtue of an intermarriage with a Choctaw woman.

The defendant answered on appeal, denying the jurisdiction and authority of the Dawes commission to hear and determine the cause and denying the legality of the rules and procedure of the Dawes commission and denying that the evidence adduced by the plaintiff is sufficient to establish his claim to citizenship by a subsequent marriage to a white woman.

The Dawes commission gave judgment for plaintiff December 2, 1896, from which the defendant appealed January 30, 1897, assigning as error that the Dawes commission erred in their judgment, because defendant alleges plaintiff forfeited his rights as a citizen of the Choctaw nation by a subsequent marriage with a white woman. Plaintiff has filed no answer to the petition for appeal.

From the evidence adduced in the case I find that the plaintiff was married on the 21st day of September, 1873, in the Choctaw nation and according to the laws of the Choctaw nation, to a recognized Choctaw and Chickasaw Indian woman by blood, and has resided in the Choctaw nation since that time; that the said Indian wife died April 1st, 1884, and August 10, 1884, plaintiff married a white woman.

Respectfully submitted this 22 day of June, 1897.

W. B. RUTHERFORD,  
*Special Master in Chancery.*

Endorsed: F. R. Robinson *vs.* Choctaw nation. Report of special master in chancery. Filed June 22, 1897. E. J. Fannin, clerk.

13

*(Record Entries.)*

In the United States Court for the Central District of the Indian Territory, at South McAlester, June 29th, 1897, April Term, 1897.

F. R. ROBINSON	} No. 157. Judgment.
<i>vs.</i>	
CHOCTAW NATION.	

On this day this cause came on to be heard in open court, the same being the 29th day of June, 1897, and one of the regular judicial days of the April, A. D. 1897, term of court. Both plaintiff and defendants announced ready for trial, and the court, having heard the evidence and argument of counsel, finds that the plaintiff, F. R. Robinson, is a member and citizen of the Choctaw nation by inter-



marriage, having heretofore been legally and in compliance with the laws of the Choctaw nation married to a Choctaw woman by blood, and that said F. R. Robinson was by the duly constituted authorities of the Choctaw nation placed upon the last roll of the members and citizens of the Choctaw nation prepared by the said Choctaw authorities, and that his name now appears upon the last completed rolls of the members and citizens of the said Coctaw nation.

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, F. R. Robinson, is a member and citizen, by intermarriage, of the Choctaw nation and entitled to all the rights, privileges, immunities, and benefits in said nation as such intermarried citizen and member.

It is further ordered, adjudged, and decreed by the court that the clerk of this court prepare a certified copy of this judgment and transmit the same to the commissioners to the five civilized tribes, and that the said commissioners place the name of the said F. R. Robinson upon the rolls, prepared or to be prepared by them, of the members and citizens of the Choctaw nation.

It is further ordered, adjudged, and decreed by the court that the plaintiff, F. R. Robinson, herein named have and recover of and from the *the* defendant, The Choctaw Nation, all his costs herein laid out and expended; for all of which let execution issue.

14

WEDNESDAY, *September 21st*, 1898.

May Term, 1898.

(Caption omitted.)

On this day come the defendant, The Choctaw Nation, by its attorney, James M. Shackelford, and presents a petition praying an appeal in this case to the Supreme Court of the United States; which petition is ordered filed, and the same is hereby granted.

Also at the same time, presents assignment of errors, and the same is ordered filed.

Also presents copy of appeal and appeal bond; which bond is by the court approved, and both are ordered filed.

Whereupon citation, returnable October 20th, 1898, was issued and signed by the court.

15

(Copy of *Petition for Appeal*.)

In the United States Court for the Central District of the Indian Territory, at South McAlester.

F. R. ROBINSON, Plaintiff,	} No. 157. Petition for Appeal and Order Granting Same.
<i>vs.</i>	
CHOCTAW NATION, Defendant.	

The above-named defendant, deeming itself aggrieved by the decree made and entered in the above-entitled cause on the 29th day of June, 1897, hereby appeals from said order and decree to the Su-

preme Court of the United States for the reasons specified in the assignment of errors filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

This 21st day of September, 1898.

JAMES M. SHACKELFORD,  
*Solicitor for Defendant.*

The foregoing claim for appeal is allowed and bond for costs fixed at one hundred dollars.

This 21st day of September, 1898.

WM. H. CLAYTON, *Judge.*

Endorsed : Filed in open court Sep. 21, 1898. E. J. Fannin, clerk.

16

*(Assignment of Errors.)*

In the United States Court for the Central District of the Indian Territory, at South McAlester.

F. R. ROBINSON, Plaintiff,	} Assignment of Errors.
<i>vs.</i>	
CHOCTAW NATION, Defendant.	

The defendant in this action, in connection with its petition for appeal, makes the following assignment of errors which it avers — upon the trial of this cause, to wit :

First. The court erred in holding that the act of Congress creating a commission to pass upon the citizenship of applicants in the Choctaw nation and the right to appeal to said court was constitutional.

Second. The court erred in overruling the plea to the jurisdiction of the Dawes commission and said court to pass upon the citizenship of the applicant herein.

Third. The court erred in holding that the laws, usages, and customs of the Choctaw nation did not control and govern admission of applicants herein.

Fourth. The court erred in holding that the Choctaw nation did not have a right to pass a law relative to citizenship in said Choctaw nation when said law in any way modified or changed a treaty of the Choctaw nation with the United States.

Fifth. The court erred in entering a decree for the plaintiff in this cause.

JAMES M. SHACKELFORD,  
*Solicitor for Defendant.*

Endorsed : Filed in open court Sep. 21, 1898. E. J. Fannin, clerk.

17

*(Bond on Appeal.)*

In the United States Court for the Central District of the Indian Territory, at South McAlester.

F. R. ROBINSON, Plaintiff,	} Bond on Appeal.
<i>vs.</i>	
CHOCTAW NATION, Defendant.	

Know all men by these presents that we, The Choctaw Nation, as principal, and T. J. Phillips and J. J. McAlester, as sureties, are held and firmly bound unto the plaintiff, F. R. Robinson, in the just and full sum of one hundred dollars, to be paid to the said plaintiff, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 21st day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a court of the United States for the central district of the Indian Territory, in a suit pending in said court between F. R. Robinson, plaintiff, and The Choctaw Nation, defendant, a decree was rendered against the said Choctaw Nation, and the said Choctaw Nation having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said F. R. Robinson, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 20th day of October, 1898:

Now, the condition of the above obligation is such that if said Choctaw Nation shall prosecute said appeal to effect and answer all damages and costs if it fails to make good the said plea, then the above obligation to be void; otherwise to remain in full force and virtue.

18

CHOCTAW NATION,  
By JAMES M. SHACKELFORD, *Its Att'y.*  
T. J. PHILLIPS.  
J. J. McALESTER.

Sealed and delivered in the presence of—  
JAMES E. GRESHAM.  
J. H. WILKINS.

Approved by—

WM. H. H. CLAYTON,  
*Judge of the United States Court for the  
Central District of the Indian Territory.*

Endorsed: F. R. Robinson vs. Choctaw Nation. Bond on appeal.  
Filed in open court Sept. 21st, 1898. E. J. Fannin, clerk.

19

*Citation.*

UNITED STATES OF AMERICA, ss :

To F. R. Robinson, Greeting :

Whereas the Choctaw Nation has lately appealed to the Supreme Court of the United States from a decree lately entered in the United States court for the central district of the Indian Territory, made in favour of you, the said F. R. Robinson, and has filed the security required by law :

You are therefore cited to appear before said Supreme Court, at the city of Washington, on the 20th day of October, 1898, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of South McAlester, in the central district of the Indian Territory, this 21st day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

WM. H. H. CLAYTON,  
*Judge of the United States Court for the  
Central District of the Indian Territory.*

Endorsed : We hereby accept service of the within this 22nd day of September, 1898. F. R. Robinson, by W. A. Durant, his attorney. Filed in open court Sept. 21st, 1898. E. J. Fannin, clerk.

20

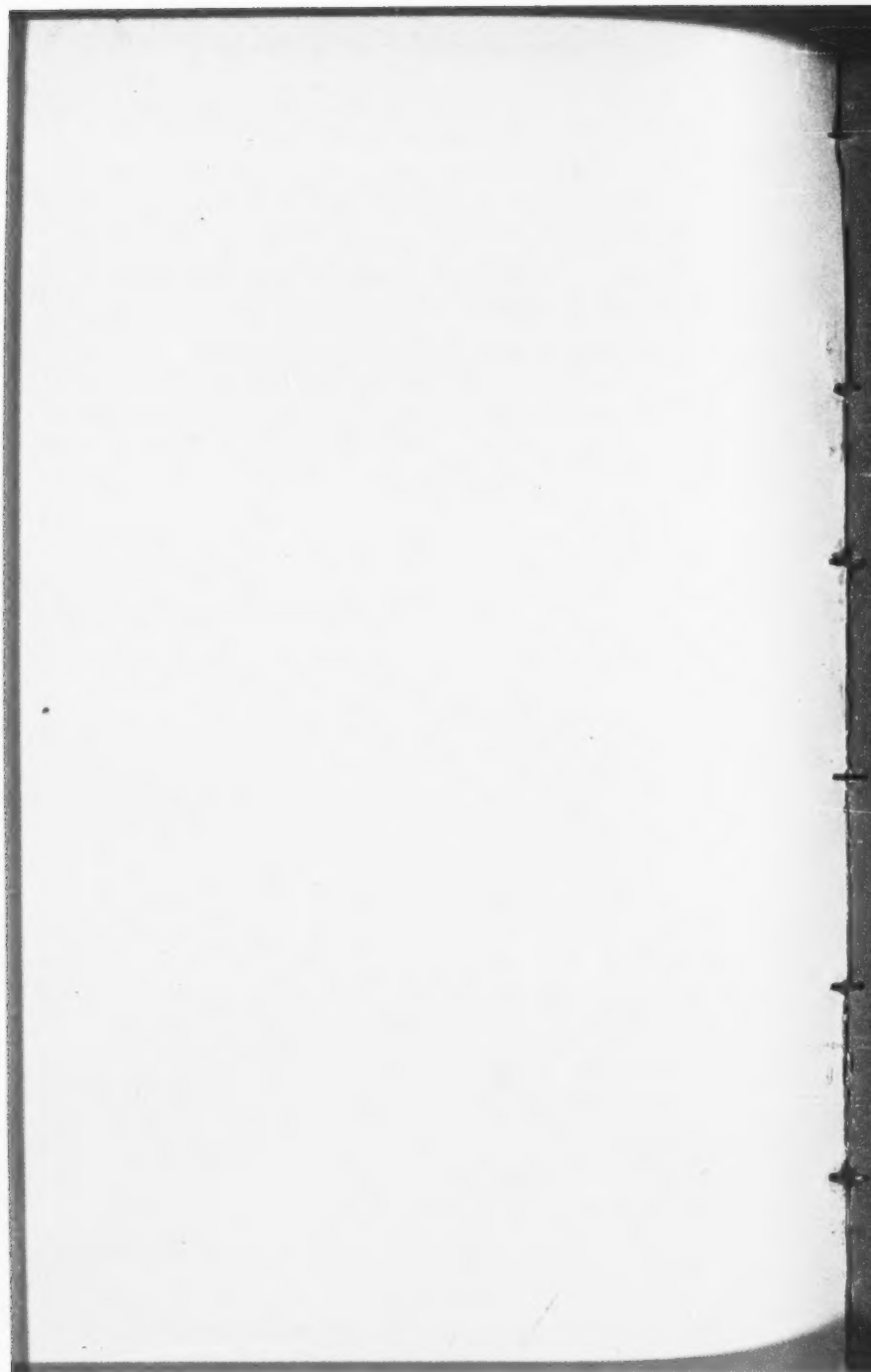
UNITED STATES OF AMERICA, }  
*Central District of the Indian Territory. }*

I, E. J. Fannin, clerk of the United States court for the central district of the Indian Territory, do hereby certify that the foregoing is a true and correct transcript of the record, proceedings, and papers filed in my office in the case of F. R. Robinson vs. The Choctaw Nation, which case has been appealed to the Supreme Court of the United States by the defendant herein.

In testimony whereof I hereunto set  
Seal United States Court, my hand and seal of office, at South  
Central District, in the McAlester, in said district, this 22nd day  
Indian Territory. of September, A. D. 1898.

E. J. FANNIN, *Clerk,*  
By I. M. DODGE,  
*Deputy Clerk.*

Endorsed on cover: Case No. 17,038. Indian Territory U. S. court. Term No., 453. The Choctaw Nation, appellant, vs. F. R. Robinson. Filed October 24th, 1898.



18100

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 461.

JENNIE JOHNSON ET AL., APPELLANTS,

vs.

THE CREEK NATION.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
TERRITORY.

FILED OCTOBER 27, 1898.

(17,046.)

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(17,046.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 461.

JENNIE JOHNSON ET AL., APPELLANTS,

*vs.*

THE CREEK NATION.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
TERRITORY.

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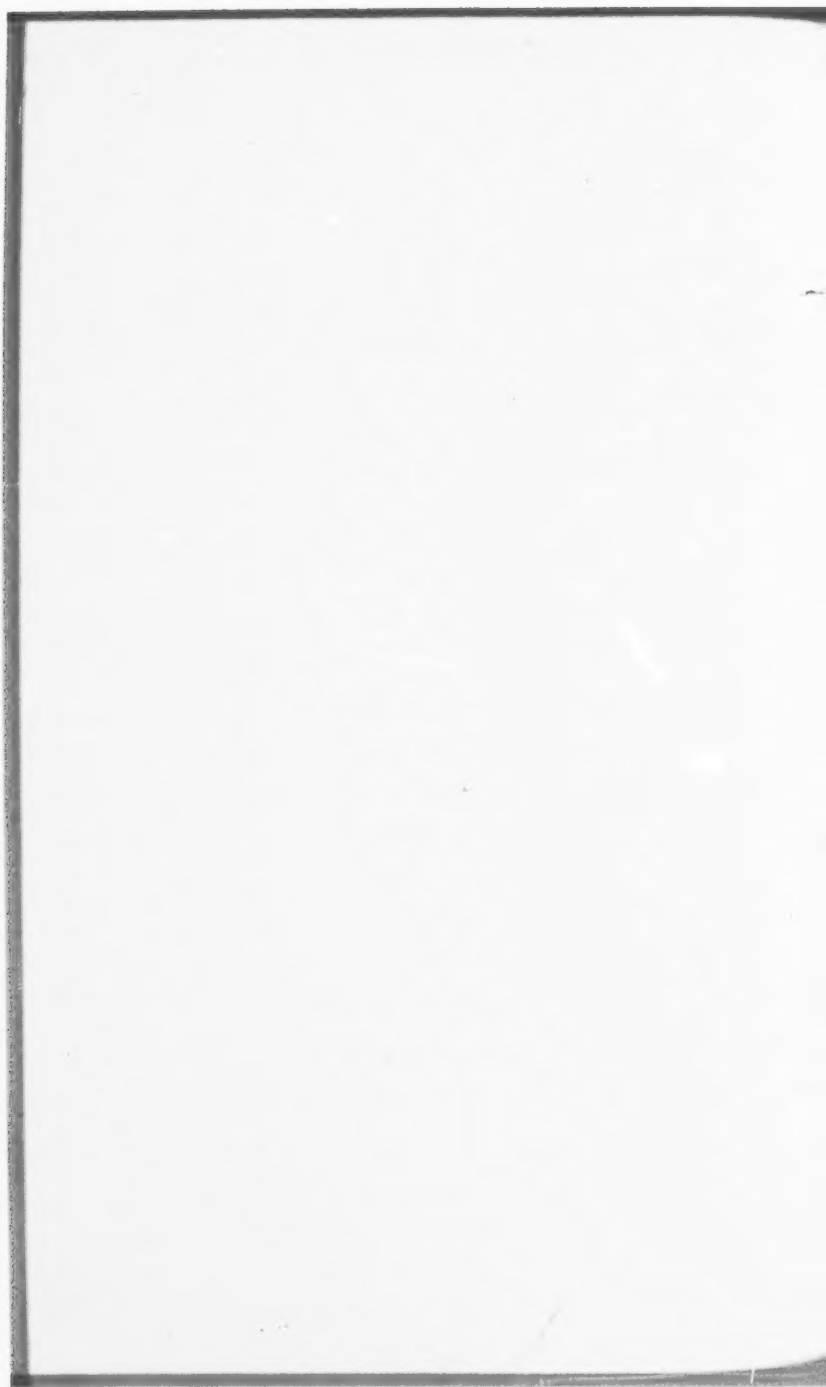


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- 1 UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District,* } ss :

Pleas in the United States court for the northern district of the Indian Territory, at Muscogee, in the matter of the application of Jennie Johnson and others for citizenship in the Cherokee nation.

Before the Hon. William M. Springer, judge of said court.

On the — day of — there was filed in the office of the clerk of said court, at Muscogee, the application of Jennie Johnson and others in said cause, which is in words and figures as follows, to wit:

- 2 To the Honorable Henry L. Dawes, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Cabaniss, and Alexander B. Montgomery, United States commissioners, authorized by an act of Congress of June 4th, 1896, to hear and determine claims to citizenship in the five civilized tribes in the Indian Territory.

GENTLEMEN OF THE SAID COMMISSION:

Your petitioners, the undersigned Thomas B. Posey and his children mentioned below; Eliza H. Allen and her children and grandchildren mentioned below; Robert T. Barber and his children named below and his ward, Jesse M. Fant, mentioned below; Benjamin A. Barber and his children mentioned below; James M. Barber, for himself and his children named below; John C. Barber, for himself and his children named below; Martha S. Coker, for herself and her children hereinafter named; Thomas B. Posey, for himself and his children hereinafter named; William Mayfield, for himself and one child; George A. Posey, for himself and child hereinafter named; Benjamin B. Posey, Mary L. Posey, Nina G. Posey, for herself and her children named hereinafter; Ambrose B. Posey, for himself and his children hereinafter named; George W. Posey, for himself and his children hereinafter named; Jennie Johnson, for herself and her children hereinafter named; William Posey, R. F. Barber, R. W. Barber, H. J. Barber, for himself and his child named below; L. E. Barber, Mollie F. Stockton, for herself and children named below; George W. Stenson, for himself and his child below named; Annie Hicks, for herself and her children named below; James M. Posey, Jr., Mary J. Covey,

- 3 for herself and her children named below; Eliza M. Bay-singer, for herself and her children named below; John W. Allen, Ben T. Allen, Mattie A. Allen, Joseph M. Allen, Richard T. Posey, for himself and his children named below; James S. Posey, for himself and his children hereinafter named; Walter Posey, for himself and his children hereinafter named; John M. Posey, for himself and his children hereinafter mentioned; Robert T. Barber, aforesaid, guardian of Robert Garner, his grandson; Susan L. Garner, for herself and her children mentioned below—

Respectfully state to your honorable body that they and each of them, and their children hereinafter mentioned, and their wards hereinafter named, are all Creek Indians by blood and descendants of Benjamin and Eliza Posey, hereinafter named, and are each and all entitled to be admitted and enrolled as members of the Creek tribe of Indians.

That their claims to such admission are not barred by any statute of limitations, and that a large number of your petitioners and their ancestors aforesaid and other relatives by consanguinity have heretofore been admitted to such membership and have been enrolled by authority of the Creek nation, have been recognized as such member- by the Creek Indians, and have drawn and shared in the disbursement of monies due from and paid by the United States to the said Creek tribe of Indians.

4 Your petitioners further state that the genealogical statements and allegations of relationship of your petitioners and others are truly and correctly stated in words and figures following, to wit:

Genealogy of the Berryhill, Posey, Allen, Barber, Coker, Stockton, Mayfield, Johnson, Covey, Baysinger, Stinson, and Fant and Vance, Oswal, Ishmael, Rickett, Hicks, Garner, &c., families.

John Berryhill was the father of Nancy Berryhill, who married Posey, both of whom were Creek Indians by blood.

Benjamin Posey was the son of Nancy Posey, *née* Berryhill. Benjamin Posey, who was seventy-six years of age in 1882, when he made his affidavit in this case, was a Creek Indian by blood.

The father and mother of Benjamin and Eliza Posey, his wife, were brothers and sisters and the lawful descendants of John Berryhill, and Eliza Posey, *née* Berryhill, is the daughter of Thos. Berryhill, a Creek Indian by blood.

The following are the sons and daughters of the said Benjamin and Eliza Posey, to wit:

Class	1. Sarah A. Posey,	born May 10th, 1825.
"	2. Thos. B. Posey,	" Sept. 14th, 1826.
"	3. Picby Jane Posey,	" Aug. 13th, 1828.
"	4. Benjamin Belle Posey,	" Dec. 9th, 1829 (dead).
"	5. John D. Posey,	" May 2nd, 1831.

5

Class	6. Martha A. Posey,	born Oct. 3rd, 1832.
"	7. Narcissa Posey	" Aug. 2nd, 1834.
"	8. Ureah Posey,	" Feb. 6th, 1836.
"	9. Nancy Green Posey,	" Aug. 29th, 1837.
"	10. Eli Posey,	" March 20th, 1839.
"	11. Tinsley E. Posey,	" Jan. 31st, 1841.
"	12. James M. Posey,	" June 30th, 1842.
"	13. George W. Posey,	" Sept. 6th, 1844 (dead).
"	14. William A. J. Posey,	" June 16th, 1846.
"	15. Eliza H. Posey,	" Oct. 4th, 1849.

Grandchildren of Ben and Eliza Posey, with Indian parent named first.

Genealogy of the Berryhill-Posey family.

Class 1. Sarah A. Posey, daughter of Ben and Eliza Posey and granddaughter of Nancy Posey, *née* Berryhill. Sarah A. Posey married Silas H. Barber, and the children of Sarah A. Barber, *née* Posey, and Silas H. Barber, her husband, are as follows, to wit:

Robert T. Barber, born Aug. 25th, 1846.

Ben A. Barber, " 1850.

James M. Barber, " Jan. 17th, 1852.

John C. Barber, " March 20th, 1853.

Martha S. Barber, " Dec. 21, 1857.

Mary A. Barber, " Jan. 31st, 1867, and died.

6

" 2. Thos. B. Posey is the second child of said Benjamin and Eliza Posey and the brother of Sarah A. Barber, *née* Posey, and has four children, to wit:

Richard T. Posey, James S. Posey, Walter Posey, and John M. Posey, ages in the order named, 44, 39, 37, 35.

" 3. Picby Jane Posey, dead; has no children.

" 4. Benjamin Bell Posey died, leaving one child, to wit, Sallie E. Ricketts, *née* Posey.

Class 5. John D. Posey, dead; no issue.

" 6. Martha A. Posey married — Mayfield and has the following children, to wit, William Mayfield.

" 7. Narcissa Posey died without issue.

" 8. Uriah Posey has five children, to wit: George A. Posey, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, and Ambrose B. Posey.

" 9. Nancy Green Posey married — Oswalt and died, leaving two children, to wit: M. W. Oswalt and Maggie Oswalt.

7

" 10. Eli Posey had a wife and died, leaving four children, to wit: George W. Posey, Jennie Johnson, *née* Posey; William Posey, and Mary Vance, *née* Posey.

" 11. Tinsley E. Posey married John Stinson, and he died and she became the second wife of Silas H. Barber. The said Tinsley E. Barber and her husband, Silas H. Barber, had the following children, to wit:

R. F. Barber.

R. W. Barber.

H. J. Barber.

L. E. Barber.

Sarah A. Barber, *née* Posey, was the first wife of said Silas H. Barber, and their children, Robert T. Barber, Ben A. Barber, James M. Barber, John C. Barber, Martha S. Barber, and Mary A. Barber, are half brothers and sisters



- to the said above R. F., R. W., H. J., and L. E. Barber by the same father, and whose mothers were sisters and the daughters of Benjamin and Eliza Posey above named.
- 8 The said Tinsley E. Stinson, *née* Posey, had two children by John Stinson, to wit: Mollie F. Stinson, born October 17th, 1863, and George W. Stinson, born July 15th, 1867.
- Class 12. James M. Posey, the son of Benjamin and Eliza Posey. Said James M. Posey died, leaving two children, to wit: Annie Hicks, *née* Poséy, and James M. Posey.
- " 13. George W. Posey died without issue.
- " 14. William A. J. Posey died, leaving four children, to wit: M. A. Posey, Albert W. Posey, Robert A. Posey, and Henry Posey.
- " 15. Eliza Hulda Posey, wife of Joseph M. Allen, who have six children, to wit: Mary J. Covey, *née* Allen, age 27; Eliza M. Baysinger, *née* Allen, age 26; John W. Allen, age 23; Ben T. Allen, age 22; Mattie M. Allen, age 18; Joseph M. Allen, age 16.

Great-grandchildren of Ben and Eliza Posey, with name of Indian parent first.

- Class 1. Robert T. Barber, the eldest son of Silas H. and Sarah A. Barber, *née* Posey, has eight children, to wit: Nettie, John, Lula, Pearl, Walter, Mary, Dovie, Sholla Barber, ages in the order named—15, 12, 10, 8, 6, 4, 2, and six months.
- 9 Ben A. Barber, brother of said Robert T. Barber, has six children, to wit: Martha E., age 14 years; Eva A., age 11 years; Ida B., age 8 years; Edward H., age 6 years; Sarah E., age 4 years; Dora B. Barber, age 2 years.
- James M. Barber, brother of Robert T. and Ben A. Barber, has the following children, to wit, Sarah E., age 19; Bertie E., age 17; John S., age 13; Pearl I., age 9; Niles, age 7, and Mary M. Barber, age 5 years.
- John C. Barber, brother of Robert T., Ben A., and James M. Barber, has the following children, to wit: Susan L. Garner, *née* Barber, age 23 years; Josephine C., age 19; Robert T., age 8 years.
- Martha S. Coker, *née* Barber, the sister of Robert T., Ben A., James N., and John C. Barber, has six children, to wit: Silas G., age 18; James M., age 17; Robert T., age 14; Eva, age 12; Maud F., age 8; Alva L., age 3 years.
- 10 Mary A. Fant, *née* Barber, died leaving one child, to wit, Jesse M. Fant, age 11 years. Said Mary A. Fant is the sister of Robert T., Ben A., James M., John C. Barber, and Martha S. Coker.

Great-grandchildren of Ben and Eliza Posey, with Indian parents first named.

Class 2. Richard T. Posey has four children, to wit: A. W. Posey, age 16; D. D. Posey, age 10; J. R. Posey, age 7; Beatrice Posey, age 3 years.

James S. Posey, brother of Richard T., has five children, to wit: A. W. M. Posey, age 15; Thomas U. Posey, age 12; Lela L. Posey, age 7; Nora S. Posey, age 4, and one infant, age one year.

Walter Posey, the brother of Richard T. and James S. Posey, has two children, to wit: Sarah E. Posey, age 14; Laura S. Posey, age 4 years.

11 John M. Posey, brother of Richard T., James S., and Walter Posey, has four children, to wit: Annie L. Posey, age 10 years; John W. Posey, age 7 years; James H. Posey, age 5 years, and Walter A. Posey, age 2 years.

Class 3. Picby J. Posey.

Class 4. Sallie E. Rickets, *née* Posey, the daughter of Benjamin Bell Posey, deceased, and the granddaughter of Ben and Eliza Posey, has three children, all of whom, together with their mother, Sallie E. Rickets, are adopted citizens of the Creek nation by blood, whose names are on the statute of said nation, at page 104, compilation of 1893.

" 5. John D. Posey, no issue.

" 6. William Mayfield, son of Martha A. Mayfield, *née* Posey.

" 7. Narcissa Posey died without issue.

" 8. George A. Posey, son of Uriah Posey and a grandson of Ben and Eliza Posey, has one child, to wit, Edward U. Posey, age 8 years.

12 Great-grandchildren of Ben and Eliza Posey.

Benjamin B. Posey, age 24 years, son of Uriah and a grandson of Ben and Eliza, has no children.

Mary Lula Posey, age 22 years, sister of George A. Posey and a granddaughter of Ben and Eliza Posey, has no children.

Nina G. Posey, sister of George A., Benjamin B., and Mary L. Posey, has one child, to wit, Fred Posey, age one year.

Ambrose P. Posey, brother of George A., Benjamin B., Mary L., and Nina G. Posey, has two children, to wit: Thomas Posey, age 3 years, and Laura E. Posey, age one month.

" 9. M. W. Oswalt, son of Nancy Green Oswalt, *née* Posey, and M. W. Oswalt, is the grandson of Ben and Eliza Posey, and has one child, to wit, W. M. Oswalt, age —. Said M. W. and his son, W. M. Oswalt, appear as Creek citizens on the statute of the Creek nation, at page 103, compilation of 1893, and at page 178 of Creek statute of said nation, 1890, undisputed citizens.

- 13 Maggie Ishmael, *née* Oswalt, sister of M. W. Oswalt aforesaid, has five children, to wit: Jane Ishmael, age —; James Ishmael, age —; Maggie Ishmael, age —; Fannie Ishmael, age —, and Mary Ishmael, age —, whose names appear as members of the Creek tribe of Indians on the rolls of said nation for Broken Arrow town, undisputed Creek citizens of Creek nation.
- “ 10. George W. Posey, son of Eli Posey and grandson of Ben and Eliza Posey. Said George Posey has three children, to wit: Katie Posey, age 12 years; Annie Posey, age 11 years, and Claud Posey, age 7 years.
- Jennis Johnson, *née* Posey, daughter of Eli Posey and sister of George W. Posey, has four children, to wit: Clarence Johnson, age 11 years; Mary F. Johnson, age 9 years; Jennie B. Johnson, age 4 years, and Walter A. Johnson, age 2 years.
- Great-grandchildren of Ben and Eliza Posey.
- William Posey, age 22 years, brother of George W. Posey and Jennie Johnson aforesaid and son of Eli Posey, has no children.
- Mary Vance, *née* Posey, sister of George W. Posey, Jennie Johnson, and daughter of said Eli Posey, has children,
- 14 to wit: Joseph Vance, age —; Florence Vance, age —, and Benjamin Vance, age —. The said Mary Vance and her said children appear on the census roll of Broken Arrow town, Creek nation, and upon the statute of said nation of 1893, page 103, and at page 178 of the statute of said nation of 1890, as members of the Creek tribe, but their names appear as Vanns by mistake or oversight instead of Vance as it should have been.
- Class 11. Mollie F. Stockton, *née* Stinson, daughter of Tinsley E. Posey, the wife of John Stinson, deceased, has three children, to wit: Roy M. Stockton, age 4 years; Harry T. Stockton, age 3 years, and Grover C. Stockton, age one year.
- George W. Stinson, son of said Tinsley E. Stinson, *née* Posey, and said George W. Stinson, is the brother of said Mary F. Stockton, and has one child, to wit, Jack Stinson, age one year.
- R. F. Barber, the son of Tinsley E. Posey, daughter of Ben and Eliza Posey, and said R. F. Barber, is the son of Silas H. Barber, the second husband of said Tinsley E. Stinson, *née* Posey; said R. F. Barber has no children.
- 15 R. W. Barber, full brother of said R. F. Barber, and has no children.
- H. J. Barber, the full brother of R. F. and R. W. Barber, has one child, to wit, Jesse J. Barber, age 2 years.
- L. E. Barber, the full brother of R. F., R. W., and H. J. Barber, and children of said Tinsley E. and Silas H. Barber, has no children.

JENNIE JOHNSON ET AL. VS. THE CREEK NATION.

- " 12. Annie Hicks, *née* Posey, the daughter of James M. Posey, has two children, to wit: Ruth Hicks, age —, and Paul B. Hicks, age —.  
James M. Posey, Jr., son of James M. Posey, Sr., is the brother of Annie Hicks; has no children.
- " 13. George W. Posey (died without issue), son of Ben and Eliza Posey.
- " 14. M. A. Posey, son of William A. J. Posey, has no children. Albert W. Posey, the son of said William A. J. Posey and brother of M. A. Posey aforesaid, has one child, to wit, ———, *all of whom are* on the census roll of Broken Arrow town, Creek nation, as members of the Creek tribe of Indians, and *their* rights are undisputed as Creeks by blood.
- 16 Robert A. Posey, brother of M. A. Posey and Albert W. Posey, has two children, all on said census roll, and their rights as Creek citizens are undisputed.  
Henry Posey, brother of M. A., A. W., and Robert A. Posey, is also on said roll, and his rights as a Creek citizen are undisputed.
- Class 15. Mary J. Covey, age 27, *née* Allen, the daughter of Eliza H. and her husband, Joseph M. Allen, has two children, to wit: John M. Covey, age 9 years, and William M. Covey, age 5 years.  
Eliza N. Baysinger, *née* Allen, age 26, the daughter of said Joseph M. and E. H. Allen and the sister of Mary J. Covey, has two children, to wit: Columbus Baysinger, age 6 years, and Nellie Baysinger, age 3 years.
- 17 John W. Allen, age 23 years, son of said Joseph M. and E. H. Allen and brother of Mary J. Covey, *née* Allen, and Eliza M. Baysinger, has no children.  
Ben T. Allen, age 22 years, son of said Joseph M. and E. H. Allen and brother of M. J. Covey, E. M. Baysinger, and John M. Allen, has no children.  
Mattie A. Allen, age 18 years, daughter of J. M. and E. H. Allen and sister of M. J. Covey, E. M. Baysinger, J. W. Allen, and Ben L. Allen.  
Joseph Allen, Jr., age 16, son of J. M. and E. H. Allen and brother of M. J. Covey, E. M. Baysinger, J. W. Allen, Ben T. Allen, and Mattie A. Allen, has no children.

The great-great-grandchildren of Ben and Eliza Posey, with the Indian parent first named.

- Class 1. Jennie Garner, *née* Barber, daughter of Robert T. Barber, son of Silas H. and Sarah A. Barber, has one child, to wit, Robert T. Garner, age 6 years.  
Susan L. Garner, *née* Barber, daughter of John C. Barber, son of Silas H. and Sarah A. Barber, has two children: to wit, John L. Garner, age 6 years, and William B. Garner, age 2 years.
- 18

Wherefore, the premises duly considered, your petitioners pray judgement of your honorable body admitting them and each of them and their children and wards herein named to citizenship and membership in the Creek nation, and for other proper relief.

HUBBARD, GARLAND & WATTS,  
MARCUM, FEARS & OWEN,

*Attorneys for the Above Petitioners.*

UNITED STATES OF AMERICA, }  
*Indian Territory, Northern Judicial District.* }

The petitioners above named state that the facts set forth in the above and foregoing petition are true.

ROBERT <sup>his</sup> x T. BARBER.  
mark.

MARTHA S. COKER.  
RICHARD T. POSEY.  
SUSAN L. GARNER.

JOHN <sup>his</sup> x C. BARBER.  
mark.

BEN A. BARBER.  
WALTER POSEY.  
G. W. POSEY.

19 L. E. BARBER.  
R. W. BARBER.  
R. F. BARBER.  
HARDY J. BARBER.  
JAMES M. BARBER.  
GEORGE W. STINSON.  
JESSE M. FANT.  
GEORGE A. POSEY.  
JOHN M. POSEY.  
ELIZA H. ALLEN.  
MARY J. COVEY.  
ELIZA M. BAYSINGER.  
JENNIE JOHNSON.  
WILLIAM POSEY.  
JAMES S. POSEY.  
AMBROSE P. POSEY.  
BENJAMIN B. POSEY.

Subscribed and sworn to before me this the 10 day of August, 1896.

[SEAL.]

W. J. WATTS,  
*Notary Public.*

20 & 21 At a regular term of the United States court for the northern district, Indian Territory, begun and held at the court-rooms, at Muscogee, I. T., on the 6th day of December, 1896.

On the 1st day of February, 1897, the same being one of the regular days of said term of said court—presiding, Hon. Wm. M. Springer, judge—the following proceedings, amongst others, were had, to wit:

JENNIE JOHNSON ET ALS., Appellants, }  
 vs.  
 THE CREEK NATION, Appellee. }

It is ordered by the court that this cause be, and the same is hereby; referred to R. P. De Graffenried, Esq., special master, under rule eight relative to practice in citizenship cases.

22 In the United States Court, Northern District, Indian Territory.

JENNIE JOHNSON ET AL. }  
 vs. } Report of Special Master.  
 CREEK NATION. }

The above case having been referred to me as special master in chancery to report to your honor my findings of fact and the contention of the parties as to the law governing the case, I submit the following as my report:

This is an application for citizenship filed before the Dawes commission to be admitted and enrolled as citizens of the Creek nation.

In the original application there were 112 applicants, all claiming to derive their Creek Indian blood from the same ancestors, Benjamin Posey and Eliza Posey, *née* Berryhill, both alleged to be one-half Creek Indians by blood, and these applicants all claim to be lineal descendants of the said Posey and wife.

The commission to the five civilized tribes in passing upon the said application admitted to citizenship 62 of the said applicants and rejected 57, and these 57 have appealed from the said decision to this court.

The following-named applicants were denied citizenship by said commission, as follows: James N. Barber, for himself and his children, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber, Mary M. Barber, and Benjamin A. Barber, for himself and his children, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Edward H. Barber, Sarah E. Barber, Dora D. Barber, and Martha S. Coker, *née* Barber, for herself and her children, Silas G. Coker, James N. Coker, Robert T. Coker, Eva Coker, Maud F. Coker, & Alva L. Coker, and Benjamin B. Posey, for himself alone; Jessie M. Fant, for himself alone; Mary Lula Posey, for herself alone, and Nina G. Posey, for herself and child, Fred Posey; and Ambrose B. Posey, for himself and two children, Thomas Posey and Laura E. Posey; George W. Posey, for himself and his children, Katy Posey, Annie Posey, and Claud Posey; Martha A. Mayfield, *née* Posey, for herself alone; William E. Mayfield, for himself and child, Martha Mayfield; Jennie Johnson, *née* Posey, for herself and her children, Clarence Johnson, Mary F. Johnson, Jennie D. Johnson, Walter A. Johnson; William Posey, for himself alone; Mollie F. Stockton, *née* Stenson, for herself and her children, Roy M. Stockton, Harry T. Stockton, Grover Cleveland Stockton; George W. Stenson, for himself and child, Jack Stenson; R. F. Barber, for himself alone, and R. W. Barber, for himself

alone; H. J. Barber, for himself and child, Jessie J. Barber; L. E. Barber, for himself alone; Anna Hicks, *née* Posey, for herself and her children, Ruth Hicks, Paul B. Hicks; and James M.

24 Posey, for himself alone.

The applications of these appellants, together with the 62 who were admitted to citizenship, filed their petition before the commission to the five civilized tribes, commonly known as the Dawes commission, on the 2nd day of September, 1896, to be admitted and enrolled as citizens of the Creek nation, alleging that they are Creek Indians by blood and descendants of Benjamin Posey and Eliza Posey, and that the said Eliza Posey was the daughter of — Berryhill, and that they were both Creek Indians by blood and recognized and enrolled citizens of the Creek nation.

That thereafter, on October 23rd, 1896, the Creek nation filed answer to the said application, and alleged that they have not shown by competent evidence that applicants are Creek Indians within the fourth degree, as required by the laws of the Creek nation, and deny that any of the applicants were on the roll of citizenship on the 10th day of June, 1896, and further deny that Benjamin Posey and Eliza Posey, his wife, through whom applicants claim to derive their Creek Indian blood, were ever residents or citizens of the Creek nation, and further deny that applicants are Creek Indians under the laws of the said nation.

25 Thereafter, on the 25th day of November, 1896, the said

Dawes commission duly acted on said application and rendered decision adverse to the applicants, and denied said application without assigning any reason or ground upon which said decision was based, and thereafter these appellants whose applications was denied filed in this court their petition on the 16th day of December, 1896, alleging that these appellants are Creek Indians by blood, and entitled to be admitted and enrolled as such, and further allege that the evidence submitted to the said Dawes commission fully and conclusively established the fact that these appellants are Creek Indians by blood and entitled to citizenship in the said nation, and that the said decision of the Dawes commission was contrary to the evidence submitted to them and contrary to the law applicable to and governing their cause. They also assign many other errors committed by said commission which I deem unnecessary to set out here.

The Creek Nation filed answer to this petition for appeal on January 12th, 1897, denying that the evidence submitted to the Dawes commission shows that appellants are Creek Indians by blood and entitled to citizenship in the Creek nation, and denying that the Dawes commission erred in rejecting the application of these appellants.

In passing upon the evidence submitted in support of appellants' claim to Creek Indians by blood and entitled to citizenship in the Creek nation, I shall notice and take up the head of each

26 family separately, and place the children of the heads of the families together, and I find from a careful examination of the pleadings and all the evidence submitted that Benjamin Posey



was a one-half Creek Indian by blood and a duly recognized enrolled citizen of the Creek nation at the date of his death; that he was married to Eliza Berryhill, and that Eliza Berryhill was a one-half Creek Indian by blood, and that the father of the said Eliza Berryhill and the mother of Benjamin Posey were brother and sister, making the said Benjamin Posey and Eliza Berryhill first cousins; that Benjamin Posey died and was buried in the Creek nation in the year 1883, and at the time of his death, as above stated, was a recognized citizen of the Creek nation.

MARTHA A. MAYFIELD.

I find from the evidence that Martha A. Mayfield, one of these appellants, is the daughter of Benjamin Posey and Eliza Posey, who were one-half Creek Indians by blood, thus making the said Martha Mayfield a one-half Creek Indian by blood; that she is not a resident of the Indian Territory and in fact has never resided in the Indian Territory, but is a resident of the State of Texas.

27

JAMES M. BARBER.

I find from the evidence that James M. Barber is a son of Sarah A. Barber, who was a daughter of Benjamin Posey and Eliza Posey, thus making the said Sarah A. Barber a one-half Creek Indian by blood, and that the said James M. Barber, the son of the said Sarah A. Barber, is a one fourth Creek Indian by blood.

In 1883 Benjamin Posey had his children duly enrolled as Creek citizens (that is, those who were then living in the Creek nation), but at that time Sarah A. Barber, his daughter, was dead, and hence was not enrolled as a citizen. She died in Texas, and her children were, at the time of the said enrollment, in 1883, in the State of Texas, and for this reason they were not enrolled as citizens by the Creek authorities. Said enrollment was made before the judge of the district court, of which H. C. Reed was then the duly acting judge.

The evidence shows that Sarah Posey was married to Silas H. Barber, a white man, and that there were born to them the following-named appellants in this case: James M. Barber, Ben. A. Barber, Mrs. M. S. Coker, *née* Barber, and that they are all one-fourth Creek Indians by blood.

I find that the said James M. Barber was born in the State  
28 of Texas and came to the Creek nation in the year 1890, where he has since resided and made his home; that the appellant James H. Barber and his children made application to the Creek council to be admitted and enrolled as citizens of the Creek nation in 1890, and that this application was referred by the council to a committee duly appointed for the purpose of investigating the claim of applicants to the rights of citizenship in the Creek nation; that said committee, after hearing all the evidence in support of appellants' claim to be Creek Indians by blood and descendants of Benjamin Posey and Eliza Posey, reported favorably upon said application and recommended the passage of an act to

enroll them as citizens by blood. Upon this recommendation the upper house, or house of kings, of the Creek council passed an act recognizing James M. Barber and his children as citizens of the Creek nation by blood. This bill was then sent to the lower house, or house of warriors, where it was tied up and had never been acted upon; that after this L. C. Perryman, principal chief of the Creek nation, being convinced the applicants were Creek Indians by blood and entitled to citizenship in the Creek nation, instructed the said James M. Barber that he could proceed to improve a farm as a citizen of the Creek nation, and instructed Joseph Mingo, who was then the town chief of Broken Arrow town, to permit the said James M. Barber to vote in the general Creek elections, which he did; that

29 the said James H. Barber and his said children were duly enrolled as citizens of the Creek nation by the town king of Broken Arrow town, and from that time on they were recognized as citizens of the Creek nation until the year 1895, when their names were stricken from the rolls of citizenship by the citizenship commission of the Creek nation, without notice to these appellants.

I further find that James M. Barber is a brother to Robert T. Barber and John C. Barber, who are recognized and enrolled citizens of the Creek nation, having been declared citizens by blood by act of the Creek council on the 30th day of October, 1889.

I find that the said James M. Barber is the father of the following living children born to him in lawful wedlock and are now living with him in the Creek nation: Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber, and Mary M. Barber, and that the said children and one-eighth Creek Indians by blood.

#### BENJAMIN A. BARBER.

As above stated, I find from the evidence that Benjamin A. Barber is a son of Sarah A. Barber and a full brother of James M. Barber, and that the evidence submitted in support of his being a Creek Indian by blood and his right to citizenship in the Creek nation is the same as in the case of James M. Barber, and that the said Benjamin A. Barber is a one-fourth Creek Indian by blood, and

30 that he resides in the Creek nation, Indian Territory; that he and his children were admitted and enrolled as citizens of the Creek nation, in Broken Arrow town, and were from then on recognized as citizens of the Creek nation until in 1895, when they were stricken from the rolls by the citizenship commission of the Creek nation.

I find that he is the father of the following living children born to him in lawful wedlock: Maria E. Barber, Eva A. Barber, Ida B. Barber, Edward H. Barber, Sarah E. Barber, Dora D. Barber, and that all of the said children are one-eighth Creek Indians by blood.

#### MARTHA A. COKER.

As above stated, I find that Martha S. Coker is the daughter of Sarah A. Barber, *née* Posey, and is a sister of James M. Barber and Benjamin A. Barber, and that she is a one-fourth Creek Indian by

blood; that the evidence in her case in support of being a Creek Indian is exactly the same as that offered to support the claims of James M. Barber and Benjamin A. Barber.

I further find that in addition to the evidence of the said James M. Barber and Benjamin A. Barber that the said Martha S. Coker drew her distributive share of the money from the United States Government as a Creek Indian in the payment of February, 1891, and known as the Oklahoma payment; that she was enrolled as a citizen of the Creek nation upon the census roll of Broken Arrow town and was recognized as a citizen until 1895, when she was  
31 stricken from the roll, together with her children, by the citizenship commission of the Creek nation; that she is the mother of the following living children born to her in lawful wedlock: Silas B. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker, and Alva L. Coker, and that the said children are one-eighth Creek Indians by blood, and that they reside with their mother in the Creek nation, Indian Territory.

#### BENJAMIN B. POSEY.

I find from the evidence that Benjamin B. Posey is a son of Uriah Posey, who was a son of Benjamin Posey and Eliza Posey, thus making him a one-fourth Creek Indian by blood; that he was born in the State of Texas and moved to the Creek nation in 1891, where he has since resided and made his home; that he was also admitted to citizenship and enrolled as such on the census roll of Broken Arrow town and was recognized as a citizen from then on until in 1895, when he was stricken from the roll by the citizenship commission of the Creek nation.

#### JESSIE FANT.

I find from the evidence that Jessie Fant is a son of Mary A. Fant, who was a daughter of Sarah A. Barber, *nee* Posey, and a full sister to John C. and Robert T. Barber, making the said Mary Fant, now deceased, a one-fourth Creek Indian by blood, making the said Jessie Fant a one-eighth Creek Indian by blood; that he was born in Texas and came to the Creek nation in 1891, where he has since resided, and that he was also admitted to citizenship  
32 and enrolled as a citizen on the census roll of Broken Arrow town and was recognized as a citizen until 1895, when he was stricken from the roll by the aforesaid citizenship commission of the Creek nation.

#### MARY LULA POSEY.

I find from the evidence that Mary Lula Posey is the daughter of Uriah Posey, deceased, who was a one-half Creek Indian by blood, and that the said Mary Lula Posey is a full sister of George A. Posey, who was an applicant in this case and admitted to citizenship by the Dawes commission.

I find that Uriah Posey was the son of Benjamin Posey and Eliza Posey, making him, as stated, a one-half Creek Indian by

blood, and that Mary Lula Posey, this appellant, is a one-fourth Creek Indian by blood. She was born in the State of Texas and came to the Creek nation in 1892, where she has since resided. That she was enrolled as a Creek citizen on the census roll of Broken Arrow town by the town king, and was recognized as a citizen until in 1895, when she was stricken from the roll by the aforesaid citizenship commission of the Creek nation.

NINA G. POSEY.

I find from the evidence that Nina G. Posey is also a daughter of Uriah Posey and a full sister of George A. Posey, who, as  
33 above stated, was admitted to citizenship by the Dawes commission, and that she is a one-fourth Creek Indian by blood. She was born in Texas and located in the Indian Territory in 1892, where she has since resided. That she, also, was placed upon the census roll of Broken Arrow town by the town king thereof, and was recognized as a citizen until she was stricken from the said roll by the citizenship commission in 1895; that she is the mother of one living child, named Fred Posey, who is a one-eighth Creek Indian by blood.

AMBROSE P. POSEY.

I find from the evidence that Ambrose P. Posey is also a son of Uriah Posey and a grandson of Benjamin Posey and Eliza Posey and a full brother of George A. Posey, now a recognized citizen of the Creek nation by decision of the Dawes commission, and that the said Ambrose P. Posey is a one-fourth Creek Indian by blood; that he is the father of Laura E. Posey and Thomas Posey, who are one-eighth Creek Indians by blood; that the said Ambrose P. Posey and his children have never resided in the Indian Territory, and are now residents of the State of Texas.

G. W. POSEY.

I find from the evidence that G. W. Posey is a son of Eli Posey, who was a son of Benjamin Posey and Eliza Posey, thus  
34 making the said G. W. Posey a grandson of Benjamin Posey and Eliza Posey, and that he is a one-fourth Creek Indian by blood; that he was born in Texas and came to the Creek nation in 1886, where he has since resided and made his home; that he proved up his right to citizenship and was enrolled as such in Broken Arrow town by the town king, and was recognized as a citizen, together with his children, until in 1895, when he and his said children were stricken from the roll of said citizenship by the citizenship commission of the Creek nation.

I further find that G. W. Posey is a full brother of Mary Vance, who appears on the roll of citizenship of the Creek nation, on page 103, Compiled Laws of 1893, as Mary Vauns, and that he is therefore a one-fourth Creek Indian by blood; that he is the father of the following children, born to him in lawful wedlock: Katie Posey, Annie Posey, and Claud Posey, who are one-eighth Creek Indians by blood.

## JENNIE JOHNSON.

I find from the evidence that Jennie Johnson is a daughter of Eli Posey, who was a son of Benjamin Posey and Eliza Posey, and that she is a full sister of G. W. Posey and Mary Vance, and that she is therefore a one-fourth Creek Indian by blood; that she came to the Creek nation in 1886, where she has since made her home.

35 I further find that she was enrolled as a citizen of the Creek nation, in Broken Arrow town, by the town king, and holds a certificate of citizenship, issued by L. C. Perryman, principal chief, some time during the '90's (the papers are torn, and I cannot make out the date).

I also find that she was recognized as a citizen, and drew money with the Indians as a Creek Indian from the United States Government in 1891, in what was known as the Oklahoma payment; that she was also, together with her children, stricken from the rolls in 1895 by the citizenship commission of the Creek nation.

I find that she is the mother of the following children, born to her in lawful wedlock: Clarence Johnson, Mary F. Johnson, Jennie D. Johnson, and Walter A. Johnson.

## WILLIAM POSEY.

I find from the evidence that William Posey is a son of Eli Posey and the full brother of the last three applicants named, making a grandson of Benjamin Posey and Eliza Posey, and that he is a one-fourth Creek Indian by blood, and that he was enrolled as a citizen and recognized as a Creek Indian in Broken Arrow town by the town king until in 1895, when he was stricken from the roll of citizenship of the Creek nation.

36

## MOLLIE F. STOCKTON.

I find from the evidence that Mollie F. Stockton is the daughter of Tinsey E. Stinson, who was a daughter of Benjamin Posey and Eliza Posey, thus making the said Mollie F. Stockton a one-fourth Creek Indian by blood. She was born in Texas, and came to the Creek nation in 1891, where she has since resided.

I further find that she was enrolled as a citizen of the Creek nation in Broken Arrow town by the town king, and was recognized as a citizen until 1895, at which time she was stricken from the roll of citizenship by the citizenship commission of the Creek nation.

I find that she is the mother of the following children, born in lawful wedlock: Roy M. Stockton, Harry T. Stockton, and Grover Cleveland Stockton.

## GEORGE W. STENSON.

I find from the evidence that George W. Stenson is a son of Tensie E. Stinson, who was a daughter of Benjamin Posey and Eliza Posey, and that the said George W. Stenson is a one-fourth Creek Indian by blood.

I further find that he has never been a <sup>resident</sup> citizen of the Creek nation, but lived in the State of Texas.

R. F. BARBER and R. W. BARBER.

I find from the evidence that R. T. Barber and R. W. Barber are twin brothers and unmarried, and are the sons of Tinsie Barber, formerly Mrs. Tensie E. Stinson, who was a daughter of Benjamin Posey and Eliza Posey, and that they are therefore one-fourth Creek Indians by blood.

I further find that they were enrolled as citizens of the Creek nation on the census roll of Broken Arrow town, and drew money from the United States Government as Creek Indians in the Oklahoma payment, and were recognized as citizens until the year 1895, when they were stricken from the rolls by the citizenship commission of the Creek nation.

H. J. BARBER.

I find from the evidence that H. J. Barber is also a son of Tensie E. Barber, formerly Mrs. Stenson; that he is also a grandson of Benjamin Posey and Eliza Posey, and is a one-fourth Creek Indian by blood; that he was enrolled as a citizen of the Creek nation on the census roll of Broken Arrow town by the town king, and was recognized as a citizen until during the year 1895, when he was stricken from the roll by the citizenship commission of the Creek nation. I find that he is the father of one child, Jessie J. Barber, who was born in lawful wedlock and is one-eighth Creek Indian by blood.

L. E. BARBER.

I find that L. E. Barber is also a son of Tensie E. Barber, formerly Mrs. Stenson, and a grandson of Benjamin Posey and Eliza Posey, and is therefore a one-fourth Creek Indian by blood, and that he was also enrolled as a citizen of Broken Arrow town and was recognized as a citizen until in 1895, when he was stricken from the roll by the citizenship commission of the Creek nation.

ANNA HICKS.

I find from the evidence that Anna Hicks is a daughter of James Posey, who was a son of Benjamin Posey and Eliza Posey, and that the said Anna Hicks is therefore a one-fourth Creek Indian by blood.

That she is the mother of two children, to wit, Ruth Hicks and Paul P. Hicks, who are one-eighth Creek Indians by blood.

I further find that the said Anna Hicks and her said two children have never resided in the Indian Territory, but lived in the State of Texas.

JAMES M. POSEY.

I find from the evidence that James M. Posey is a son of James Posey, who was a son of Benjamin Posey and Eliza Posey, and that he is therefore a one-fourth Creek Indian by blood.



I further find that he has never resided in the Indian Territory, but resides in the State of Texas.

WILLIAM MAYFIELD.

I find from the evidence that William Mayfield is a son of Martha A. Mayfield, who is mentioned in the above report, and that the said Martha A. Mayfield was the daughter of Benjamin Posey and Eliza Posey, making this appellant, William Mayfield, a grandson of the said Benjamin Posey and Eliza Posey, and he is therefore a one-fourth Creek Indian by blood.

I further find that this appellant has never resided in the Indian Territory, but is a resident of the State of Texas.

I respectfully ask that your honor allow me a reasonable fee for my services as special master in this case.

Respectfully submitted.

R. P. DE GRAFFENRIED,  
*Special Master.*

My fee paid.

40 In the United States Court for the Indian Territory, Northern District, at Muscogee.

JENNIE JOHNSON and Her Children, CLARENCE, MARY F., Jennie D., and Walter A. Johnson, Appellants,	} No. 56.
vs. THE CREEK NATION, Appellee.	

Martha A. Mayfield *et al.*  
James A. Barber *et al.*  
Benjamin A. Barber *et al.*  
Martha S. Coker *et al.*  
Benjamin B. Posey *et al.*  
Jesse Fant.  
Mary Lula Posey *et al.*  
Nina G. Posey *et al.*  
Ambrose P. Posey *et al.*  
G. W. Posey *et al.*  
William Posey *et al.*  
Mollie C. Stockton *et al.*  
Geo. W. Stenson *et al.*  
R. F. & R. W. Barber.  
H. J. Barber *et al.*  
L. E. Barber *et al.*  
Anna Hicks *et al.*  
James H. Posey *et al.*  
William Mayfield *et al.*

Rejected by Dawes commission, —  
appeal, but are — included in the  
master's report.

41 Comes the appellee, The Creek Nation, by attorney, Ben T. Du Val, and says that the report of R. P. De Graffenried, Esq., special master in this case, ought to be set aside and held for naught for the errors hereinafter set forth:



1st. It does not appear that the said De Graffenried took the oath as special master, as required by the statute in such cases made and provided.

2nd. Because the court had no authority to refer this case to a special master.

3rd. The said special master did not comply with the law prescribing his duty in such cases, nor the order of this court, in this, that he reports his conclusions as facts instead of giving the facts themselves and referring to the affidavits of the witnesses upon whose testimony he finds the facts; and, further, he does not, in making such findings, refer the court or the counsel for the appellee to the page of the transcript, which contains 88 pages (in copy furnished the appellee), embracing about fifty affidavits and a large number of certificates and transcripts, thereby rendering the report in this instance of no assistance to the court or counsel in the ascertainment of the facts in this case, as shown by record evidence and the affidavits of witnesses.

4th. The master also erred in finding and reporting that all of these whose application was denied by the Dawes commission filed in this court their petition for appeal on the 16th day of December, 1896, because, in fact, no such petition to this court was ever  
42 presented or filed, whereas the fact is, as appears by the records of this court, that the only petition which was filed for appeal from the decision of the Dawes commission was filed by Jennie Johnson for herself and family only. Said petition is entitled "*Jennie Johnson et al., appellants, vs. The Creek Nation, appellee.*" The petition contains the following paragraph: "The facts relied upon by the appellants to establish their rights in the Creek nation, as aforesaid, are as follows, to wit: The affidavits of Mary E. Vance, Joe Mingo, Eliza Allen, Joe Allen, Thomas Barber, and John Barber," whose affidavits were produced before the Dawes commission to establish the citizenship of the said Jennie Johnson, but makes no reference to the great mass of testimony which was taken and filed before the Dawes commission in support of the other rejected applicants; and as a further evidence that the appeal was intended to embrace only Jennie Johnson and her family, attention is called to the following affidavit, verifying said petition for appeal:

"Hugh Johnson, being duly sworn, states that he is the husband and agent of the above-named Jennie Johnson, and that the facts set forth in the foregoing petition are true, as he verily believes."

(Signed)

"H. R. JOHNSON."

"Subscribed and sworn to before me this 17th day of Dec., 1896."

(Signed)

"JAS. A. WINSTON, Clerk."

43 The master ought not to have found and reported to this court that the appeal was taken by any other than Jennie Johnson and her immediate family, and his statement quoted

above, showing that all of those whose application for citizenship had been denied by the Dawes commission had filed in this court their petition for appeal on the 16th day of December, 1896, is not sustained by the facts, and it was error for him to consider and report any fact in regard to the citizenship of *the* any of the parties except Jennie Johnson, who was the only appellant, and all other names, except hers and her families, should be stricken out of the report.

5th. The master erred in finding that James M. Barber and his children were recognized as citizens of the Creek nation by virtue of his enrollment by H. C. Reed, judge of the district court, and by Joe Mingo, king of the Broken Arrow town, because it appears that his right to citizenship had been denied by the council of the Muscogee nation, which was the only authority which could admit them to citizenship, because it also appears that the names of the said James M. Barber and his family were stricken from the rolls by the citizenship commission, which had the power conferred upon it to strike the names of non-citizens from the rolls.

See act creating citizenship commission, approved May 30th, 1895.

6th. The master erred in finding that Benjamin A. Barber and his children were "admitted and enrolled as citizens in Broken Arrow town and were recognized citizens of the Creek nation," because under the laws of the Creek nation enrollment by town kings conferred no right of citizenship until the enrollment was approved by the council, and he should have found from the fact of their names being stricken from the rolls by the citizenship commission in 1895 that they never had been lawfully admitted and enrolled as citizens of the Creek nation.

7th. The master erred in finding that Martha A. Coker was enrolled as a citizen of the Creek nation upon the census roll of Broken Arrow town and was recognized as a citizen until 1895, when she and her children were stricken from the rolls by the citizenship commission of the Creek nation, because such enrollment by the town king, as before stated, did not of itself make her a citizen and her name was lawfully stricken from the roll. He erred also in finding that she drew her distributive portion of the money from the United States Government as a Creek Indian in the payment of February, 1891, because it appears from the testimony that she was not a Creek Indian, and, under the laws of the Creek nation, the king and warriors of Broken Arrow town can be made to refund to the nation the amount paid to her and her children.

See sec. 293, McKellog's Digest, 101.

45 The council itself has declared that "it had become notorious that by questionable methods and practices many non-citizens had been counted as citizens and participated in the *per capita* distribution of public funds," and such persons were claiming that by such participation they had become fully recognized citizens, and the council declared that such participation does not make a person a citizen of the Muscogee nation and the authorities

of the nation shall not accept or consider that fact as evidence of citizenship.

8th. The said master erred in finding that Benjamin B. Posey, Jesse Fant, Nina G. Posey, G. W. Posey, Jennie Johnson, William Posey, Mollie Stockton, R. F. Barber, and R. W. Barber, H. J. Barber, L. E. Barber, were admitted to citizenship of the Creek nation and enrolled as such on the census roll of Broken Arrow town and were recognized as citizens for that reason until the names of themselves and their children were stricken from the rolls in 1895 by the citizenship commission, because, as before stated, under the laws and usages of the Creek nation, enrollment by the town king conferred no right of citizenship until it was approved by the council, and the fact that their names were stricken from the rolls by the citizenship commission shows conclusively that they were not lawfully enrolled and not recognized as citizens of the Creek nation, and, as we have already seen, the fact that some of them

46 drew money in the distribution of public funds was declared by the council not to be evidence of their right to citizenship, and no doubt the wholesale enrollment of these appellants and others in Broken Arrow and other towns caused the passage of the several acts and resolutions on the subject of citizenship in May, 1895, one of which created the citizenship commission, with power to strike off the names of non-citizens.

9th. The master in his report finds that Martha Mayfield, Ambrose B. Posey, George W. Stenson, Anna Hicks, James M. Posey, and William Mayfield have never resided in the Indian Territory and are all residents of the State of Texas, and the appellee insists that they could not be citizens of the Creek nation, being citizens and residents of the State of Texas.

10th. The master erred in finding that Benjamin Posey was a half Creek Indian by blood and a duly recognized enrolled citizen of the Creek nation, and that his wife, Eliza Berryhill, was a one-half Creek Indian by blood, and the said Benjamin Posey died and was buried in the Creek nation in the year 1893, and was at the time a recognized citizen of said nation. If such was the fact the said master has failed to point out the name of the witness and the page of the transcript where said testimony can be found. On the contrary, the testimony shows that the said Benjamin Posey, the ancestor of the appellants, resided in the State of Texas  
47 nearly all of his life, and that all of his children were born and reared there, where they grew up and married and had families and remained until after the passage of the act of Oct. 26, 1889. The majority of their blood was white, and they were to all intents and purposes white persons and aliens to the Creek nation, and could only be admitted to citizenship by the council, and the master should have so found and reported.

11th. The master erred, as stated above, in treating the appeal in this case as embracing any other person than Jennie Johnson and her children, because, as already shown, she was the only party who prayed for an appeal. The appellee in the answer to the original petition stated that the plaintiffs or petitioners sought to establish their

right to citizenship by the affidavits of each other, and by uniting all in one petition hoped to draw in those who were not entitled to admission by blood or otherwise, if indeed any of them were. In this instance it is very evident upon the face of the papers that Martha A. Mayfield and her family, James A. Barber and his family, Benjamin A. Barber and family, Martha S. Coker and family, Benjamin B. Posey and family, Jesse Fant, Mary Lula Posey and her family, Nina G. Posey and her family, Ambrose P. Posey and family, G. W. Posey and family, William Posey and family, Mollie C. Stockton and family, George W. Sten-  
 48 son and family, R. F. and R. W. Barber, J. H. Barber and family, L. E. Barber and family, Anna Hicks and family, James M. Posey and family, and William Mayfield and family, have endeavored to wring into this case and obtain the benefit of an appeal taken by Jennie Johnson, and their names should be stricken out of the said master's report.

For the above and many other manifest errors in the said master's report the same should be stricken out, and the said pretended findings be totally disregarded, and the court should examine the papers thoroughly, because it is evident that this case from beginning to end is a conspiracy to obtain citizenship by fraud and misrepresentation.

Respectfully submitted.

BEN T. DU VAL,  
*Attorney for Creek Nation.*

Dictated to F.

49 In the United States Court for the Northern District of the Indian Territory, Sitting at Muscogee.

JENNIE JOHNSON ET ALS.	} Sp. Master's Findings on Bill — Exceptions.
vs.	
THE CREEK NATION.	

In the above cause the Creek Nation files eleven exceptions to the master's report, and I have carefully examined each of said exceptions and submit this by report upon same. I shall only notice those exceptions which upon their face seem to have some merit.

Exception No. 3 is to the effect that the report does not quote from the evidence. As stated by the counsel for the Nation, the record in this case is very voluminous, with large numbers of affidavits and other evidence submitted, and to have quoted the evidence of each witness would make a report too burdensome for the court to read. I carefully considered all the evidence and my report shows my conclusions from all the evidence, and I therefore recommend that said exception be overruled.

The 4th exception is that no appeal is taken in this case by any other of the applicants except Jennie Johnson and her family. It is true the petition for appeal simply states "Jennie Johnson *et al.*," but does not the word- "*et al.*" include all rejected claimants besides Jennie Johnson? I so considered it in my report.

50 And, in addition to this, Thomas Marcum, one of the attorneys for the appellants, filed before me an affidavit and states that the original petition in this case contained over one hundred petitioners, all of whom made joint application and the whole of said petitioners were joined in one case at the instance and upon the suggestion of one of the members of the Dawes commission, and that there has never been any objection or exception to the joining of said applicants, and the style of the case herein before said commission was Thomas B. Posey *et als.*, but the said commission, by its judgement entered in said cause, admitted about one-half of said petitioners to citizenship; that the first name of the said original docket of said commission, Thomas B. Posey, was admitted to citizenship, and the judgement of said commission admitting said applicants was not appealed from by the Nation. They therefore, upon appeal to this court, were compelled to change the style of the case from Thomas B. Posey *et al.*, who was admitted to citizenship and who did not appeal, and substituted therefor one of the names of the rejected claimants, and the name of Jennie Johnson was adopted as the first name, with the words *et al.*

Said affidavit further states that said appeal was taken not only by Jennie Johnson, but by all the claimants in said petition  
51 who were not admitted to citizenship before said Dawes commission.

I think the objection is more technical than just, and as there has been great latitude allowed in these cases by which justice and right might prevail, I do not think that this exception should be considered by the court. The other exceptions I do not think should be considered, as my report fully explains how and where the applicants were enrolled upon the Creek census rolls.

I therefore respectfully recommend that the exceptions to the report be overruled.

R. P. DE GRAFFENRIED,  
*Special Master in Chancery.*

52 On the 15th day of April, 1898, there was filed in the office of the clerk of said court the report of the special master, N. A. Gibson, in said cause; which is in word- and figures as follows, to wit:

In the United States Court in the Indian Territory, Northern District, at Muscogee.

JENNIE JOHNSON ET AL.	} No. 56. Report of Special Master.
vs.	
THE CREEK NATION.	

I, N. A. Gibson, special master herein, respectfully show to the court that in accordance with the order of reference herein to me made by the court on the 22nd day of December, 1897, in which I was ordered to take testimony and report as to the time the applicants came to the Creek nation, what effort each made to be enrolled as citizens, and when and by whom they were enrolled, and when and

by whom they were decitizenized, if at all, and how long and by what authority each was ever recognized as a citizen of the Creek nation, I have taken the testimony as ordered and herewith file the same and make it a part of my report, and that upon an examination of the same I find as follows:

## I.

That this application was made by James M. Barber, for himself and his children, Sarah E., Bettie E., John S., Pearl I., Niles, Mary

53 M. Barber; by Benjamin A. Barber, for himself and for his children, Maria E., Eva, Ida B., Edward H., Sarah E., and Dora D. Barber; by Martha S. Coker, *née* Barber, for herself and for her children, Silas G., James N., Robert T., Eva, Maude F., and Alva L. Coker; by Benjamin B. Posey, for himself; by Jesse M. Fant, for himself; by Mary Lula Posey, for herself; by Nina G. Posey, for herself and her child, Fred Posey; by Ambrose B. Posey, for himself and his children, Thomas and Laura E. Posey; by George W. Posey, for himself and his children, Katie, Annie, and Claud Posey; by Martha A. Mayfield, *née* Posey, for herself; by William E. Mayfield, for himself and his child, Martha Mayfield; by Jennie Johnson, *née* Posey, for herself and her children, Clarence, Mary F., Jennie D., and Walter A. Johnson; by William Posey, for himself; by Mollie F. Stockton, *née* Stenson, for herself and her children, Roy M., Harry T., and Grover Cleveland Stockton; by George W. Stenson, for himself and for his child, Jack Stenson; by R. F. Barber, for himself; by R. W. Barber, for himself; by H. J. Barber, for himself and his child, Jessie Barber; by L. E. Barber, for himself; by Anna Hicks, *née* Posey, for herself and for her children, Ruth and Paul B. Hicks, and by James M. Posey, for himself alone.

That the proof shows that Martha A. Mayfield, Ambrose B. Posey and his children, George W. Stenson and child, Anna Hicks and children, James M. Posey, and William Mayfield and his child, Martha Mayfield, all reside in the State of Texas and have never  
54 resided in the Creek nation, and that the facts hereinafter found do not apply to these claimants except as to their being of Creek blood, they having never been enrolled or recognized as citizens of the Creek nation.

That all the remaining claimants reside in the Creek nation, where they have *raised* since before the year 1890, James M. Barber being the last one who located permanently in said nation, and that all the findings in this report apply to all of them alike.

That the proof shows that the claimants in this case are the lineal descendants of Benjamin Posey and his wife, Elizabeth Posey, *née* Berryhill, both of whom were born in the Creek nation and were Creek Indians by blood and first cousins.

That there has always been a law among the Creeks from time immemorial against the intermarriage of first cousins, and that a great many years ago Benjamin Posey having married his first cousin, Elizabeth Berryhill, they left the Creek nation and moved to the State of Texas to avoid the penalty for having violated the



laws of the Creek nation in this respect; that they continued to live in the State of Texas until the year 1882, at which time they returned to the Creek nation, where they lived the remainder of their lives.

That most of the claimants herein were born in the State of Texas and made their homes there, but it appears that they always regarded the Creek nation as their actual home, and that some  
55 members of the family were in the habit of visiting the Creek nation every year, and that, as is stated in the testimony of Joseph Mingo taken by me on page 7, "they have never been regarded as lost people."

That these claimants continued to return to the Creek — until the year 1890, at which time James Barber and his immediate family came back, they seeming to have been the last to return to make this nation their permanent home, his full brothers, John C. and Robert T. Barber, having been admitted to citizenship in the Creek nation on October 30, 1889, by act of council.

That the said James Barber had lived in the Creek nation as early as the year 1872 and had afterwards gone back to Texas.

## II.

That after the claimants came back to the nation they began to exercise all the rights of citizenship in the nation, and began to improve farms and make pastures, and continued to live in said nation without opposition until the year 1893, when the proof shows that some of the claimants began to make farms in certain pastures held by other citizens of the nation, E. B. Childers among others, and these parties applied to L. C. Perryman, the principal chief of the nation, to have the claimants removed from the farms and nation as intruders.

That after the said application was made to the chief he instructed Napoleon B. Childers, the judge of Coweta district, Creek nation, to order the claimants to come before him and prove up their rights to remain in the Creek nation as citizens.

56 That, in accordance with the said order, Judge Childers, on the 6th day of June (see Exhibit B to J. M. Barber's testimony), notified the claimants to come before him on the 13th of June, 1893, and establish their rights to live in the Muscogee nation, and that on the said day the claimants appeared before the said judge, at the court-house in said district, with their witnesses and made proof of their Creek blood and of their rights to citizenship in the Creek nation to the full satisfaction of Judge Childers. (See testimony and decision at the end of the testimony.)

That the claimants were thus admitted to full citizenship in the Creek nation.

## III.

That the act of the Creek council under which Judge Childers and Chief Perryman acted in this investigation of the rights of these claimants appears on page 63 of Perryman's Compilation of the Creek Laws, 1890.



## IV.

That the claimants herein continued to exercise all the rights of citizens in the Muscogee nation, both political and property, from that time until the year 1895.

## V.

57 That by an act approved on January 31, 1895, the Creek council authorized the principal chief to instruct the members of the council to take correct census of the citizens and members of their respective towns.

That this roll was made in anticipation of a *per capita* payment to be made.

That as soon as the town kings made up the said rolls of their towns copies were to be submitted to the house of kings and warriors, and the chief was instructed to call the council in extra session to compare the copies and correct the same for the purpose of making payment.

That rolls were made up by the various town kings in accordance with this act and the general law and custom of the Creek nation from time immemorial, and that during the extra session of council in May, 1895, an act was approved on May 15th, under which a committee composed of six members of the house of kings and twelve members of the house of warriors was appointed to take charge of the town rolls and examine the same, and if the names of any non-citizens appeared thereon to expunge the same and report their action to the council.

That by an act approved May 17, 1895, this committee of eighteen were instructed and directed to entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in the nation and strike from the rolls and preserve a correct list of all the names so stricken out and report the same to the council.

58 That the only report ever made by the said committee appears to have been made on June 8, 1895, and shows the number of citizens to be 13,841, and "the number enrolled *enrolled* which were stricken from the rolls by the committee as doubtful is 619."

That no names were given in the said report, and that there was no means by which the parties whose names had been stricken from the town rolls could find out that they had been stricken off unless some friend informed them.

## VI.

That the proof taken by me in regard to the actions and proceedings of this committee of eighteen discloses a condition of affairs that is startling on account of the corruption and folly indicated by the actions of the various members of the committee.

It appears that the sessions of the committee were held informally, and that any visitor was at liberty to come in, and if he heard a name called that did not please him he was at liberty to get up

and say that he objected to that man, and the name was forthwith stricken off.

The proof shows that a number of the members of the committee had some trouble or dispute, and one man would get up and object to the names of a large number of the members of another man's town; this, of course, would make the member from the afflicted town mad, and he would get even by jumping up and object-  
 59 ing to a still larger number of names on the roll — his opponent's town.

That there was no reason whatsoever for the actions of the committee, and that parties were stricken off the rolls who had lived in the Creek nation all their lives and were full-blood Creek Indians, whose citizenship could not be disputed by any one.

That the proof shows that the claimants herein were all enrolled upon the town rolls of their town, and that they were stricken off at the instance of Ellis Childers, who states in his testimony that he had no reason for his action except that he wanted revenge, because certain of the members of his own town had been stricken off the rolls.

That the action of the committee was ridiculous and childish, and that I am of the opinion that no respect should be shown to their decisions.

That it appears that no proof whatever was called for when a name was objected to, and that the presiding officer ruled that he had no discretion and was forced to strike off any name to which objection was made, though he and all the committee might well know that the person objected to had always been a citizen.

That the persons objected to were not allowed to be present and defend themselves, and that no notice was sent them of their having been stricken from the rolls.

That the claimants herein were never officially notified that  
 60 they had been taken off the rolls, and only learned of it from some friend who was present.

That they immediately began to endeavor to get back on the rolls and made application to the citizenship commission appointed under the act approved May 30, 1895, and filed their bond for costs with Joseph Mingo as surety, but that they were never able to get a hearing before said commission, though N. B. Childers swears that he was twice summoned to Okmulgee as a witness in their case, and that the case was never even called for trial.

That Ellis Childers, the man who had them stricken off the rolls, testifies that they were always regard- as citizens of the nation, both before and after the time their names were taken off the rolls, and that the proof shows that J. M. Barber has been acting as deputy or assistant to Upter Bird, the prosecuting attorney of Coweta district, since the 19th day of January, 1897.

The premises considered, I find that the claimants are Creek Indians by blood; that their grandparents were both citizens of the Creek nation by blood, and that the claimants and their parents have never so far seaprated themselves from the Creek nation as to lose their citizenship therein.

That they have all returned to the Creek nation at various times before the year 1890, and have all been recognized as citizens of the nation by proper authorities.

That they were all on the authenticated rolls of the Creek nation in the year 1895, and that they were unlawfully stricken  
61 from said rolls by the eighteen committee, and have never been given an opportunity to prove their rights to be restored to said rolls.

That if the names of the claimants had not been stricken off by the eighteen committee in the manner shown above these claimants would now be on the authenticated rolls of the Creek nation.

That the action of the said committee of eighteen was not founded upon any fact and was made without regard to the actual rights of the claimants and by a man who knew that they were lawful citizens of the Creek nation.

I respectfully ask that the court allow me a reasonable fee for my services herein.

Respectfully submitted this 4 day of April, 1898.

My fee paid.

N. A. GIBSON,  
*Special Master.*

62 In the United States Court for the Indian Territory, Northern District, at Muskogee.

JENNIE JOHNSON ET AL., Appellants, }  
vs. } No. 56.  
THE CREEK NATION, Appellee. }

Comes the said appellee, by attorney, Ben T. Duval, and excepts to the report of the said special master as follows:

First. In finding that the appellants were "admitted to full citizenship in the Creek nation" the said master erred.

The act of the Creek council under which Judge Childers and Chief Perryman acted in said pretended investigation published upon page 63, Perryman's Compilation of the Creek Laws, in 1890, were repealed by act of council approved November 29th, 1883, creating a permanent citizenship committee, which act is also published on page 125 of same digest.

Second. The master erred in not finding and reporting that the "claimants were thus not admitted to full citizenship in the Creek nation, because the pretended investigation and judgment of Judge N. B. Childers was *coram non judice*."

Third. The said master erred in finding and reporting "that the claimants and their parents have never so far separated themselves from the Creek nation as to lose citizenship therein." The  
63 master also finds that the claimants were born in the State of Texas, and some of them remained there until after the passage of the act of October 26th, 1889, usually called the alien act; some — them came before, and it was his duty to report the names of those who come to the Creek nation after the passage of

said act." He should have found and reported that, having been born outside of the limits of the Creek nation, they could not lawfully become citizens until admitted by the council or some tribunal having jurisdiction lawfully conferred upon it by act of council, and he should have found that they had never been admitted by act of council or any tribunal having jurisdiction.

Fourth. The master erred in finding that the said claimants were all enrolled on the town roll, there being no legal and competent testimony before him upon which to base such findings. The town roll nor a copy of the same containing their names was produced, and no foundation was laid for the introduction of secondary evidence.

Fifth. The master erred in censuring the action of the eighteen committee in this language: "The actions and proceedings of the committee discloses a condition of affairs that is startling on account of the corruption and folly indicated by the action of the various members of the committee;" and also, "That parties were stricken off the rolls who had lived in the Creek nation all their lives and were full-blood Creek Indians, whose citizenship could not be disputed by any one." This court has decided that it will not

64 reverse the judgments of the tribunals of the Creek nation in matters within their jurisdiction. It is improper to cast reflections upon the conduct of this committee in the discharge of duties conferred upon it by acts of council referred to in said report upon *ex parte* testimony produced by interested parties in a collateral proceeding.

Sixth. The master erred in finding "that the claimants were all on the authenticated rolls of the Creek nation in the year 1895, and that they were unlawfully stricken from said rolls by the eighteen committee." The testimony taken by him shows that they never were lawfully on any rolls, and the town rolls they pretended to have been on were not authenticated.

The committee of eighteen was created "to take charge of the census rolls of the various towns and carefully examine same and ascertain whether they are correct" and to expunge the names of non-citizens from the rolls reported separately to the council, and all the acts of the committee to be subject to the approval of the national council.

See act approved May 15th, 1895.

These are the rolls the claimants allege from which their names were unlawfully erased.

The committee did report June 8th, 1895, and on same day the national council passed an act approving said report and required and instructed the towns to base the next general election in September, 1895, for members of the national council upon the number of citizens as shown by the census reported by the committee of eighteen and continue the same until some further enumeration should necessitate a different apportionment. The act apportions the kings and warriors according to the several towns therein mentioned.

See act approved June 8th, 1895, page- 12, 13, and 14, Pamphlet Acts of 1895.

These rolls as corrected by the committee of eighteen were recognized and approved by resolution approved December 4, 1895.

See same acts, page 18.

Seventh. The master erred in not finding that the names of the claimants were lawfully erased by the committee of eighteen, whose report was adopted and approved by the national council, and that their claims were not established by competent testimony, and that they never were on any authenticated roll at any time, and the testimony shows that they were not on any roll whatever on June 10th, 1896.

BEN T. DU VAL,  
*Attorney for the Creek Nation.*

66 JENNIE JOHN- ET AL. } # 56. Answer to Exceptions of Ap-  
vs. } pellee.  
THE CREEK NATION. }

In reply to the exceptions filed herein by the attorney for the appellee, I, the undersigned, special master herein, respectfully report to the court that after a careful examination of the exceptions and the testimony upon which my original report was based I can make no change in said report, as desired by the exceptions.

In regard to the third exceptions of appellee, I will state that the testimony failed to disclose the time the claimants came to the Creek nation, but it does show that nearly all of them, with the exception of J. M. Barber alone, I think, came to the said nation to reside before 1889, and that said J. M. Barber had been in the nation many times before with various relatives.

Respectfully submitted this 4th day of April, 1898.

N. A. GIBSON,  
*Special Master.*

(Endorsed as follows:) Filed Apr. 15, 1898. Jas. A. Winston, clerk.

67 On the 16th day of June, 1898, there was filed in open court opinion of court in said cause, which is in words and figures as follows, to wit:

In the United States Court for the Northern District of the Indian Territory, Sitting at Muscogee.

JENNIE JOHNSON ET AL. }  
vs. } No. 56.  
THE CREEK NATION. }

On the motion for rehearing.

*Statement of Facts.*

This case was twice referred to a special master. It was first referred to Mr. R. P. De Graffenried, who submitted the following report thereon:

See page 22.

To which report counsel for the Creek nation submitted exceptions, and to these exceptions the special master replied; all of which are set forth herein. Thereafter the claimants applied for leave to take additional testimony, which was granted, and on the 22nd day of December, A. D. 1897, the case was referred to Mr. N. A.

Gibson, owing to the illness of Mr. De Graffenried, with directions to take additional testimony and to make report thereon.

Mr. Gibson's report is as follows:

See page 52.

Mr. Gibson's report and exceptions thereto by the Creek nation and his reply to those exceptions are as follows:

See page- 62 and 66.

*Opinion by the Court.*

SPRINGER, Judge:

The testimony in this case is very voluminous, as appears from the reports of the special masters. There is much conflict in the testimony, which is apparently irreconcilable. There are also a large number of claimants embraced in this case, and quite a number of their cases will depend upon the legal status of the claimants in this case. This court will not attempt to recapitulate all of the evidence set forth in the reports of the special masters. Only such facts will be referred to as are necessary to an understanding of the legal propositions involved. The laws of the Creek nation in reference to citizenship are nearly all involved, more or less, in the decision of this case. Some of these acts have been commented upon in the general opinion of this court in reference to Creek

69 citizenship. In that opinion special construction was given to the act of the Creek council approved October 26, 1889, and known as the alien act. The first section of the act, being section 295 of the Compiled Laws of the Muscogee Nation, 1893, is as follows:

"All persons who were born or who may be hereafter born beyond the limits of the Indian Territory and may have heretofore been entitled to make application for, citizenship on account of Indian blood or tribal adoption, and who have continuously resided beyond or outside of the jurisdictional limits of the Muscogee nation for a period of 21 years, are hereby declared aliens and not entitled to citizenship in the Muscogee nation, or to any of the privileges thereof."

This section embraces the important features of the law known as the "Alien act." Counsel for the claimants in this case have contended with considerable force and with some plausibility of soundness that the alien act of the Creek nation is in conflict with the constitution of the nation and therefore void. Counsel have ignored the doctrine laid down by the Supreme Court of the United States in the case of *Roff vs. Burney* (168 U. S. Rep'ts, page 223). In that case the Supreme Court, referring to an act of the Chickasaw legislature which had conferred citizenship upon a citizen of the United States and to the subsequent act repealing the same,



said: "This act was not one simply taking effect as of the date of its passage and then withdrawing rights admitted to have  
70 been theretofore legally granted, but was retroactive in its scope and purported to annul and destroy all that had ever been anticipated to be done in respect to the matter." And the court further held: "It is enough to hold that all personal rights founded on the mere status created by the prior act fell when that status was destroyed."

In the Roff case citizenship had been previously conferred on the wife of Roff by an act of the Chickasaw council, and if citizenship once conferred could be withdrawn how much more reasonableness and justice is there in withholding citizenship never conferred or enjoyed? The alien act was aimed at those who were born out of the jurisdictional limits of the nation and who could not assert rights of citizenship in the nation, except by positive authority of the Creek council. Hence the Creek council may determine the basis or condition upon which such persons could be admitted to citizenship. The Creek council may have said, and it had the power to say, that persons born out of the jurisdiction of the nation and then resided out of the jurisdiction of the nation should be regarded as aliens. Claimants to citizenship who were born out of the jurisdiction of the nation cannot complain that the statute is more liberal to them than they were entitled to claim. Quoting further from the Roff case, the Supreme Court held:

"The validity of the act withdrawing citizenship from the  
71 wife of plaintiff and the consequent withdrawal from plaintiff — all of the rights and privileges of citizenship in the Chickasaw nation has been practically determined by the authorities of that nation, and that determination is not subject to correction by any direct appeal from the judgement of the Chickasaw courts."

Here is positive recognition of the right of Indian nations to control the question of citizenship in the nation, and that when the nation has exercised its authority that authority and the method pointed out by it is not subject to correction by any direct appeal from the judgement of the tribal authorities. This court therefore reiterates its former opinion to the effect that the Creek council had the authority to pass the law known as the alien act, and that the law is binding upon this court in the determination of all questions of citizenship in the nation when its provisions may be involved. Counsel have referred in their respective briefs and exceptions to an act of the Creek council printed on page 63 of Perryman's Compilation of the Laws of the Muscogee Nation, 1890. This act consists of three sections, which are as follows:

"SEC. 1. All persons having resided out of the limits of the Muscogee nation and whose rights as citizens of the same may seem to be questionable in consequence of intermarriage with non-citizens, shall be *bona fide* citizens of this nation, provided they can prove to the satisfaction of the proper authorities that they are  
72 of Muscogee descent and not further removed than the fourth degree."

Section 2 relates to adopted citizens and persons of African descent.



"SEC. 3. Any person claiming citizenship under these provisions, shall, in order to establish his or her rights, prove the same by a responsible disinterested native witness before the district court."

The date of the passage of this act is not given. It is not reproduced in McKellop's Compilation of the Laws of the Muscogee Nation, published in 1893. It was doubtless passed prior to 1871. The author of McKellop's Compilation, evidently being of the opinion that the foregoing act has been repealed by subsequent provisions, has left it out of the laws of the nation. Counsel of the Creek nation also insists that the act in Perryman's Compilation just quoted has been repealed by subsequent acts. The alien act, which was passed in 1889, is published on page 105 of McKellop's Compilation of the Laws of the Muscogee Nation.

Section three of the act, printed on page 63 of Perryman's Compilation, confers upon the district courts of the Creek nation a very indefinite jurisdiction. It says that the claimants may prove their citizenship by a responsible disinterested native witness before the district court. This is the only jurisdiction conferred upon the district court. What the district court may do after such proof has been submitted is not stated, nor is it stated what will be the

73 effect of any judgement that the district court may enter.

The claimant can merely submit his proof to the district court. No previous act had conferred upon the district court the power to admit persons to citizenship whose citizenship was disputed. This is the only act to which attention has been called on this subject or which involves in any way the district court. Unless, therefore, the district court had inherent authority to pass upon the question of citizenship and to admit persons to citizenship in the Creek nation, this section can only be construed as conferring upon the court the power to receive the proof of citizenship and report the same to any tribunal authority to confer it. This seems to be the construction which was given to the act by N. B. Childers, who, in his testimony in this case taken before the special master, Mr. Gibson, states that he received a notice from Chief Perryman to investigate the citizenship of the Barbers and the Poseys, and that after making investigation he made a report to the chief to the effect "that they had a right there as citizens." Judge Childers, in his testimony, page 2, says: "That seemed to settle the question, and they remained there as constituents of Broken Arrow town, and the town chief kept them on his rolls until they were taken off the rolls. I recognized them as citizens until

74 they were taken off the rolls." Judge Childers, however, states as follows in his testimony, page 2: "Our chiefs have always held that it was the duty of the district judges to settle the question of citizenship of persons in their districts." And further Judge Childers says: "It was the custom for a great many years for the town chief to keep a roll of the citizens of his town, and when he came to the council no question was made as to the names on the rolls. This custom was in full force until a few years ago. I cannot tell exactly how long ago. There was no change in this custom until the chiefs of the different towns began to scratch the

rolls of each other's towns. This brought on conflicts among them and the matter was taken into council, and the counsel began to legislate about it. There has been no positive law, so far as I know, repealing this custom. If there had been such a law, it would have been the duty of the principal chief to communicate it to the judges. Some hold that it is the duty of the judges to pass upon these citizenship matters, and some hold that it is not. Several years ago the question came up in the council, of which I was a member at the time, as to who should draw the payment that was to be made. Finally the committee of 18 was appointed to investigate the rolls. When this committee investigated the rolls they did not notify the parties who they were investigating. They took up the different

names, and if they thought that he should not be on the rolls  
75 the names were scratched off. I was before that committee several times. The Barbers and Poseys were scratched off at that time, also the Morgans, Wassoms, Perry, and a whole lot of others. The roll from which these parties were scratched off was the legal roll of the Creek nation."

Judge Childers' opinion that the rolls from which these names were scratched was the legal roll of the Creek nation is not binding upon this court. He was simply a witness, testifying before the special master, when his opinion was submitted. He submits another opinion in his testimony further on, as follows:

"After the decision of Judge Adams in regard to the alien law, I, with a great many others, considered that the law was of no effect because they went right straight and took in some that it had gone against."

This opinion of Judge Childers is also not binding upon this court, for he is evidently in error on the subject. Judge Adams submitted no decision on the question. The decision to which he referred was a opinion of the supreme court of the Creek nation, transmitted at the request of the citizenship commission, and that opinion does not hold that the alien law is of no effect, but, on the contrary, fully sustains its provisions.

The rolls from which the names of the claimants in this case were stricken by the committee of 18 was the roll of the citizens of  
the nation prepared by the town chiefs of the several towns  
76 of the Muscogee nation. That was merely a census roll, and was only *prima facie* evidence of citizenship in the nation. The legislation of the Creek nation is conclusive upon this point. The act creating the committee of 18, which was approved May 15, 1895, is headed in the session laws, "Committee of 18 on census rolls of 1895," and is as follows, there being but one section:

"That a special committee, to be composed of six members from the house of kings and twelve members from the house of warriors to be appointed to take charge of the census rolls of the various towns and carefully examine the same and ascertain whether or not they were correct, and if any of them are found to contain the names of non-citizens all such names shall be expunged from the rolls and reported separately to the national council."

All the acts of the special committee herein provided for shall be

subject to the approval of the national council. There was an amendment to this act, or rather a supplemental act, passed May 17, 1895. The preamble to this supplemental act is as follows :

"Whereas it has become notorious that by questionable and unjust methods and practices many non-citizens have heretofore been counted as citizens and participated in the *per capita* distribution of the public funds of the nation ;

And, whereas, such persons as have in this manner obtained a share in the payments of moneys of the nation made to her  
77 citizens, claim by such participation that they have become fully recognized citizens thereof, entitled to all the rights, privileges and immunities incident thereto, which claim if admitted, must eventuate in great injustice to *bona fide* citizens of the nation : Therefore,

Be it enacted by the national council of the Muscogee nation, That the fact alone that any person has at any time participated in the *per capita* distribution of any of the public moneys of the Muscogee nation, does not make of such person a citizen of the Muscogee nation entitled to the rights and privileges of recognized citizens thereof, and shall not by any authority of the nation be subject or construed as evidence sufficiently to perfect and establish such claims.

Be it further enacted, That the committee of eighteen (18), appointed by the act of the extraordinary session of council, approved May 13th, 1895, to examine and correct the census rolls of 1895, are hereby instructed and directed to entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in this nation, and strike from the rolls and preserve a correct list of all the names so stricken out and report the same to the present session of council."

The committee of eighteen submitted a report, which is found on page 12 of the Session Laws of June, 1895, and is as follows :

*" Committee Report.*

"OKMULGEE, I. T., June 8, 1895.

78 Honorable national council, M. N.

GENTLEMEN: We, your committee of eighteen, appointed to consider and correct the census rolls of the several towns as handed in by the town chiefs, have examined and corrected the forty-seven rolls. The correct number on the rolls is 13,841. The number enrolled, which were stricken from the rolls by the committee as doubtful, is 619. Having completed the work assigned to us, we submit this report and asking that the report be adopted and the committee discharged.

Respectfully,

M. J. SMITH, *Chairman.*

MILDRED McINTOSH, *Clerk."*

Approved June 8, 1895.

This report was submitted to the national council of the Muscogee nation. It was approved by the council and is published among the laws of the nation. This roll of citizens of the nation was adopted by the council and became then and thereafter the final roll of citizens of the Muscogee nation. From the rolls theretofore existing the committee struck off the names of 619 persons. It was directed to expunge from the rolls the names of all non-citizens, and it was instructed by a supplemental act to entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in the nation, and to strike from the rolls those who might be found to be non-citizens and submit a report to the council. The committee reported the names of 619 persons as stricken from the roll by the committee "as doubtful." Whether the committee passed upon these persons as citizens and whether there is any doubt about their citizenship is immaterial. Their report was confirmed, and those who were put upon the rolls by this committee were approved by the council as citizens of the nation. This roll was in existence at the time Congress legislated upon the subject, and was the final roll of citizens of the Creek nation which was confirmed by congressional legislation.

At the same session of the council of the Creek nation at which the committee of eighteen was created there was passed an act creating a citizenship commission, which act was approved May 30, 1895. The report of the committee of eighteen was approved June 8, 1895, within ten days after the passage of the act creating the citizenship commission. All persons who were therefore reported as doubtful and who were dropped from the rolls by the committee of eighteen, and the report approved by the council, were permitted, if they saw fit, to appear before the citizenship commission and prove their right to citizenship. The preamble to the act is as follows:

"Whereas, the opinion prevails throughout the country that a large number of non-citizens have been enrolled as citizens on the different census rolls that have been made from time to time in the past; and,

Whereas it is currently asserted and believed by many that a large number of claimants who have heretofore appeared before the committee of the national council on citizenship and other authorities of the nation and established or obtained recognition of their claims to citizenship in the nation, accomplished the same by the undue use of money and other fraudulent means."

From this preamble it will be seen that the council entertained grave suspicions as to the methods which had prevailed theretofore in the placing of the names upon the census rolls in the several towns of the Creek nation. "It was currently asserted and believed by many that a larger number of claimants had established or obtained recognition of their claims to citizenship by the undue use of money and other fraudulent means," and it was for the purpose of eliminating from the census rolls the names of all such persons who had been suspected of having procured citizenship by questionable means that this citizenship commission was established. The names

of the claimants in this case had all been stricken from the census rolls by the committee of 18, with the approval of the council. It was incumbent upon them therefore to appear before this commission and establish their citizenship and secure the replacing of their names, if possible, upon the rolls of those who were recognized as citizens of the nation.

81 Mr. N. A. Gibson, special master in this case, has commented with deserved severity upon the conduct of Ellis Childers, whose affidavit is found in the papers of this case. Ellis Childers was recently the treasurer of the Creek nation, but owing to alleged official misconduct he was deposed from that position, and he is now under indictment in this court, Vinita, charged with issuing fraudulent Creek warrants. At the time the committee of 18 was in session he was speaker of the house of warriors and named the members of the committee from that house. He states in his deposition that the committee was appointed to examine the rolls by reason of the fact that there was soon to be a *per capita* payment made to the members of the Creek nation. Mr. Childers' understanding of the law creating this committee of 18 is stated by him as follows:

"Every town king has to present his rolls to this committee. Then the act authorized that if any respectable citizen objected to any person on the rolls of any town that the committee should strike the names of such persons off the rolls for further investigation;" and further, "It got to be a kind of trade for a while striking off people and getting employment from them to get them back on the rolls."

82 Mr. Childers' understanding of the law is not warranted by the text of the statute creating the committee. The text has already been quoted. The committee was authorized to take charge of the census rolls of the various towns and carefully examine the same and ascertain whether or not they were correct, and if any of them were found to contain the names of non citizens all such names shall be expunged from the rolls and reported separately to the council. A supplemental act, approved May 17, 1895, instructed and directed the committee of 18 "to entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship."

There is no intimation in the law anywhere that every name objected to should be stricken off. Such a construction can only be accounted for on the theory advanced by Mr. Childers, that names of persons were stricken off for the purpose of getting employment from them to get them back on the rolls. He further stated that he was informed that a number of his people had been stricken from the rolls, and that it was his duty to look after the interests of his town, and that he therefore went before the committee and staid there a week. He further said that when the names of his people had been objected to and stricken off that he began to object to the names of persons on the rolls of other towns, and that he objected

83 to the Barbers and Poseys and the Coker family and the Wassom, Morgan, Perry, and a whole lot of them, and then added, "I was trying to get my revenge. The committee took my word and scratched them off. Those were the legal rolls of the Creek nation. After I done that I tried to get my people back. I did not object to those parties because I did not believe that they were citizens, but I wanted to get my people back on and tried to get a compromise, and after the king let my people back, and then I would have withdrawn my objection and let the parties get back to whom I had objected. Finally I got all my people back except the Smiths, but I had to resort to other means." What other means Mr. Childers resorted to is not stated. We are only left to draw inferences. He does state, however, that he got all his people on the rolls except the Smiths. This statement is in direct contradiction with other parts of his testimony, which were to the effect that *that* if any reliable citizen objected to a person on the rolls of any town that the committee strike the name of such person off the roll for further investigation. Several other witnesses whose testimony will be found in the case stated that when any person's name was objected to it was dropped from the rolls and reported to the council, but Mr. Childers refutes this statement by stating that he got all his people back on the rolls except the Smiths. Mr.

Childers further stated in his deposition as follows:

84 "The supreme court decided that the alien act was unconstitutional, and that the council could not pass an act depriving any person with Creek blood of their interests in the land." He then proceeds to state why the alien law was passed, and states, "I had a good deal to do with the alien law, and think I dictated it."

Mr. Childers' interpretation of the opinion of the supreme court of the Creek nation in reference to the alien law accords fully with his course as a member of the council, viz: That persons were stricken off the rolls to get employment to put them back. The opinion of the supreme court did not decide that the alien act was unconstitutional; but, on the other hand, it fully sustains the constitutionality of the law, as we have heretofore shown in the general opinion of the court in reference to Creek citizenship.

There are several other depositions in the record in which reference was made. Mr. McGilbra stated that he was a Creek Indian by blood, and that he was a member of the committee of 18. He said, "If any citizen objected to any name as being fraudulently on the roll, the committee must strike the name off." And, further, "This committee had no authority to pass upon any citizenship, and consequently they merely followed the rules that were placed before us, and put aside each and every person that any one objected to, we having no right to force the parties objecting to proof;

85 we could not do more than just scratch the names off the rolls they were on."

Several other witnesses made similar statements to this, and it seems that the committee did, after striking off names, *did* put them back again, as testified to by Ellis Childers.

Mr. N. A. Gibson, special master, in his report characterized the



proceedings of the committee of 18 as disclosing "a condition of affairs that is startling, on account of the corruption and folly enacted by the action of the various members of the committee." And further on, "that the action of the committee was ridiculous and childish, and that I am of the opinion that no respect should be shown to their decisions." He further states that the claimants in this case were never officially notified that their names had been taken off the rolls, but that they learned of it from some friend who was present. However, they made an effort to get back on the rolls, and made application to the citizenship commission appointed under the act approved May 30, 1895, but "that they were never able to get a hearing before said commission," though N. B. Childers swears that he was twice summoned to Okmulgee as a witness, but that the case was never even called for trial.

86 This court is not authorized to inquire into the motives which actuated the members of the council of the Creek nation in the passage of any legislation by that body. It is sufficient to know that the committee of 18, whose conduct is brought in question, were only authorized to report to the national council, and that all acts of the special committee of 18 "shall be subject to the approval of the national council." This committee of 18, after making up its report, submitted it to the council, and the council adopted that report, a copy of which has been already set forth in this opinion. That report was approved June 8, 1895. Council evidently considered this report. The roll made up by the committee was submitted to the council, and the council approved it. It thereupon became the final roll of citizens of the Creek nation. Those who were omitted from the rolls no longer were recognized as members of the Creek nation. It appears that the committee of 18, although it was authorized to expunge from the rolls the names of all non-citizens, it reported those whose names were stricken off as doubtful. This report was doubtless made in view of the fact that there was then in existence, created by act of May 30, 1895, a citizenship commission created for the express purpose of

87 sitting as a high court to determine and settle all cases which shall involve the question of right of citizenship of any person in the Muscogee nation. Those persons who were reported as doubtful were permitted to apply to this citizenship commission for the purpose of having their names placed upon the rolls as citizens of the nation. It seems that the claimants in this case did apply to that commission, and that it investigated their cases; but if we are to accept the statements of the witnesses in the case the citizenship commission failed to report upon these cases.

Counsel for the claimants in this case insist that the district courts of the Creek nation were clothed with authority to determine questions of citizenship and to enroll as citizens the names of those persons cited before the district courts. We have already quoted the act of the Creek nation which conferred jurisdiction upon the district courts.

Section 3 of that act is as follows:

"Any person claiming citizenship under these provisions shall, in



order to establish his or her rights, prove the same by a responsible, disinterested native witness before the district court."

While proof was to be taken for the purpose of establishing the rights of the claimants, the district court was not clothed with authority to declare them citizens, but merely to place them upon the rolls as citizens, and the names so put upon the rolls *was*

88 always subject to the final approval of the Creek council.

The Creek council never delegated to the district courts power to determine the question of citizenship and to make final decisions on the subject. All the legislation of the Creek council shows that the rolls made by the town kings and by the district judges were subject to the approval of the council. Mr. McGilbra, a Creek citizen by blood, whose testimony has already been referred to, testified as follows:

"It is a standing law and custom for each of the 47 towns through their kings to make up their rolls of their own citizens, and then these rolls are presented to the council for approval."

The record of the admission of the claimants in this case to citizenship by Judge N. B. Childers is as follows:

"After questioning the witnesses in the Barber and Posey cases, I, N. B. Childers, judge of Coweta district, rule and so decide that the claimants heretofore mentioned were citizens of the Muscogee or Creek nation and entitled to enrollment.

Witness my hand this 13th day of June, 1893, and the seal of Coweta district.

N. B. CHILDERS,  
*Judge Coweta District, M. N."*

It is stated that the docket of Judge Wesley Tiger has been mutilated, and that the forty pages of his docket, which covered citizenship cases, has been cut out *out* and destroyed. Hence we

89 are deprived of the benefit which should be derived from an inspection of his records. However, counsel for claimants insist that as the clerk of Judge Tiger's court has testified to the contents of those destroyed pages of the record that the court should accept the affidavit of the clerk in lieu of the record of the court. It is not necessary, in view of the decision which this court will make in this case, to pass upon the question as to the records of Judge Tiger, nor as to the validity and binding force of the judgement of Judge Childers in the Barber and Posey cases. The Creek council has disposed of that matter and placed it beyond the judicial determination of this court. After the opinions and decisions of Judges Tiger, Reed, and Childers had been pronounced, especially in this case, the Creek council passed an act approved Jan. 31, 1895, less than two years after Judge Childers' decision in the Posey and Barber cases, in reference to the rolls of citizens of the nation. By this act the principal chief was directed to set a day and notify the members of the council to proceed to take a correct census of the citizens and members of their respective towns.

When such census should have been taken it was to be transmitted to the council, and the chief was to call the council in extra

session for the purpose of carefully examining the rolls thoroughly and correct the same. The rolls, therefore, of the several  
90 towns, which contained the names of the claimants in this case, were to be submitted to the council, which was authorized to examine them thoroughly and correct the same, and the *per capita* payment, then about to be made, was to be made according to such corrected rolls. Here the council asserted its power to revise the rolls prepared by the town kings and did revise them. Subsequently it was learned that fraud had been practiced in securing the enrollment of persons for the purpose of participating in this payment, and then it was that the committee of 18 was given additional authority to examine these rolls and strike off the names of all persons who were found to be non-citizens. About this time the large *per capita* payment arising out of the proceeds of the sale of the Oklahoma lands was to be made, and there was, as we may well imagine, considerable anxiety on the part of claimants to have their names enrolled as citizens for the purpose of enabling them to participate in these *per capita* payments. These contentions and rivalry were attended with such corrupt practices that the national council took notice of the fact, and gave as the reason for the establishment of the citizenship commission that a large number of claimants had secured recognition of their claim to citizenship in the nation by the undue use of money and other fraudulent means. The council therefore created the committee of 18 and the citizenship commission for the purpose of requiring all doubtful  
91 claimants to prove up their right to citizenship. The claimants in this case were stricken off the rolls by the committee of 18, and the report of the committee was approved by the national council, June 8, 1895. The citizenship commission was then in session. The claimants applied to that commission, which considered their cases, but, it is stated, no action was taken by the commission. The records of the commission have not been certified to this court, and the only information as to the action of the commission is conveyed in the affidavits or depositions of witnesses.

It has always been regarded as the province of the Creek council to finally reverse and correct the rolls made up by the town kings. The records of the Creek council fully establish the fact that it has always claimed and exercised the right to finally pass upon the question of citizenship. On Nov. 29, 1883, fifteen years ago, a standing committee of two members of the house of kings and three members of the house of warriors was created, to be known as the citizenship committee. See Perryman's Laws of the Muscogee Nation, 1890, p. 125. The law creating this commission authorized it to carefully examine and determine all questions which were finally brought to its attention in reference to citizenship. It was required to report to the national council all of its actions and determinations, to be subject to its adoption or rejection.  
92 This act shows what has been the uniform course of the Creek council in reference to rolls of citizenship. They are always to be subject to its adoption or rejection. The only delegation of authority to finally pass upon citizenship cases is that which was

given to the citizenship commission created by the act of May 30, 1895. In that act it was provided that "When any case shall be decided in favor of any person by the commission, the plaintiff ever after shall be a full citizen and accorded all the rights of any other citizen." It was provided in this act as follows:

"And in any enumeration hereafter to be made of the citizens of the nation any person applying for registration against whose citizenship any question may arise shall be required to trace his or her origin to the rolls of the names of citizens to be prepared under this act."

No matter, therefore, what may be the final decision of Judges Childers, Reed, and Tiger in citizenship cases.

All such decisions were made subject to the action of this citizenship commission and of the council itself. Even if the district courts had conferred citizenship upon the claimants in this case, the Creek council had the right to withdraw the citizenship which was thus conferred, unless the council had thereafter provided that the decisions of the district courts should be final and conclusive. No such declaration had ever been made, and the council has uniformly exercised the right to finally pass upon the rolls of citizenship in the nation without any reference whatever to the actions of the district courts or the town kings. If rights of citizenship

93 had therefore been exercised it was within the power of the council to withdraw those rights, and such act of the council would be retrospective in its scope and annul and destroy all that was ever attempted to be done in respect to the matter (*Roff v. Burney*, 168 U. S., 223). The validity of the act of the Creek council withdrawing citizenship from the claimants in this case and the consequent withdrawal from them all of the rights and privileges of citizenship in the Creek nation has been practically determined by the action of the Creek council, and that determination is not subject to correction by any direct appeal from the judgement of the Creek council (*Roff v. Burney*, *supra*). The claimants in this case were dropped from the roll of recognized citizens by the action of the Creek council. They were declared to be doubtful citizens and it was the duty of the citizenship commission on presentation of their claims to pass upon them.

The special master, N. A. Gibson, in his report on this case states as follows:

"That they (the claimants) immediately began to endeavor to get back on the rolls, and made application to the citizenship commission appointed under the act approved May 30, 1895, and filed their bond for costs, with Joseph Mingo as surety, but that they were never able to get a hearing before said commission, though N. B. Childers swears that he was twice summoned to Okmulgee as a witness in their case and that the case was never even called for trial."

This statement is supported by the evidence which was before the special master, and it fully illustrates the reckless manner in which the witnesses for claimants in this case testified. I have sent for and obtained the original record of the proceedings of the Creek

citizenship commission which was appointed under the act of the Creek council approved May 30, 1895. This record discloses the fact that the testimony of at least fifteen witnesses was taken in this case and kindred cases by the commission, and the testimony of each witness is recorded at length. Some of the same witnesses whose affidavits were before the special master in this case were before the commission, and their testimony was taken down and entered of record. Notwithstanding this fact, the claimants' witnesses testified before the special master that "they were never able to get a hearing before said commission." The commission made no finding of fact or decision as to the claimants, but it did pass upon and allow the claims of other persons of the same family.

If these claimants had satisfied the commission by the evidence that they were entitled to citizenship, the presumption is that their claims would have been allowed.

It seems that the claimants did not prove to the satisfaction of the Creek citizenship commission that they were entitled to citizenship in the Creek nation, nor have they proven to the satisfaction of this court that they are lawfully entitled to be enrolled as citizens of the nation.

95 There is some question as to what parties took an appeal in this case. The petition for appeal has disappeared from the papers. It was before the special master and the counsel for the Creek nation, both of which refer to it. The counsel for the Creek nation contend that only Jennie Johnson and her children took the appeal, while the special master is of the opinion that all the parties who were rejected by the United States commission who belonged to the Barber-Posey families were included in the appeal by reason of the fact that "*et al.*" were used in the petition. If that is all that is relied upon to bring the claimants into this court as appellants it does not seem sufficient. All persons who are intended to be included in the appeal should have been set forth by name in the petition for appeal, and if this was not done those whose names are not included are not to be considered as appellants. However, the court is of the opinion that, whether all the parties have joined in the appeal or not, they are not entitled to be enrolled as citizens of the Creek nation.

The judgement of the United States commission rejecting these claimants is affirmed, and their applications to be enrolled as citizens of the Creek nation is denied.

(Endorsed as follows :) Filed in open court Jun-16, 1898. Jas. A. Winston, clerk.

96 & 97 At a regular term of the United States court for the northern district, Indian Territory, held at the court-rooms, at Muscogee, Indian Territory—presiding, Hon. William M. Springer, judge of said court—on the 16th day of June, 1898, the same being one of the regular days of said term of said court, the following proceedings, amongst others, were had, to wit:

JENNIE JOHNSON ET ALS., Appellants, }  
 vs. } #56.  
 THE CREEK NATION, Appellee.

Come the above-named appellants, by their solicitors, and also comes the above-named appellee, by its solicitor, and this cause having been heretofore submitted to the court upon application for citizenship of said appellants and the answer of the appellee and the evidence for both parties on file in the case and the master's report, and the court, having been now well and sufficiently advised in the premises, doth find the issues for the appellee, The Creek Nation.

It is therefore ordered, considered, and adjudged by the court that the said appellants, Jennie Johnson, Clarence Johnson, Mary E. Johnson, Jennie B. Johnson, Walter A. Johnson, Benjamin A. Barber, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Sarah E. Barber, Edward H. Barber, Dora D. Barber, James M. Barber, Sarah E. Barber, Berdie Barber, John S. Barber, Pearl I. Barber, Niles Barber, Mary E. Barber, Martha S. Coker, *née* Barber; Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maude F. Coker, and Elva L. Coker, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, and Fred Posey, George W. Posey, Katie Posey, Annie Posey, and Claude Posey, Molly F. Stockton, *née* Stinson; Ray M. Stockton, Harry Stockton, Grover C. Stockton, R. F. Barber, R. W. Barber, Hardy Barber, and Jessie L. Barber, L. E. Barber and William Posey, in this cause be, and they and each of them are hereby, refused admission and enrollment as citizens of said nation, and the judgment and decision of the commission to the five civilized tribes is in all things approved and affirmed as costs of appellants, and that execution issue therefor; to which action of the court in refusing to admit and enroll the appellants and each of them as citizens of the Creek nation they and each of them at the time excepted.

98 The affidavits of Nathaniel Berryhill, James M. Barber, G. A. Posey, Joseph Mingo, Silas H. Barber, John M. Posey, R. S. Barber, D. M. Prendergast, M. A. Posey, Mrs. E. H. Allen, John C. and Robert T. Barber, and Benjamin Posey, which are in words and figures as follows, to wit:

INDIAN TERRITORY, }  
 Northern Judicial Division. }

Now, on this 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for and within the Indian Territory, Nathaniel Berryhill, who, being duly sworn, upon his oath states that he is a Creek Indian by blood and a member of that tribe, and was well acquainted with Benjamin Posey for fifty years in the State of Georgia and Alabama and also in Texas, and knew him to be the same man that left Alabama in 1846. Affiant further states that Benjamin Posey was a son of Nancy Posey, whose maiden name was Nancy Berryhill; that Nancy Posey, *née* Berryhill, was a daughter of John Berryhill, who was a half-blood Creek or Musco-

gee Indian. Affiant further states that the following-named persons were the uncles and aunts of the said Benjamin Posey: John D. Berryhill, Alexander Berryhill, Pleasant Berryhill, Patsy McGahee, *née* Berryhill; Katy Self, *née* Berryhill; Susan Self, *née* Berryhill; Betsy Berryhill, all of whom were emigrants from Georgia to the Creek or Muscogee nation about — year 1832; that the aforementioned persons are the sons and daughters of John Berryhill, who was a Creek or Muscogee Indian by blood and descent. He also states that Eliza Posey, wife of Benjamin Posey, was a daughter of Thomas Berryhill, who was a brother of the above-mentioned persons and son of John Berryhill.

99 Affiant further states that to the best of his knowledge that the said Eliza Posey was a half-blood Creek or Muscogee Indian.

Affiant further states that the following-named persons are the sons and daughters of Benjamin Posey and Eliza Posey: Sarah A. Barber, whose maiden name was Sarah A. Posey, and Thomas B. Posey, Benjamin B. Posey, Martha A. Posey, Nancy Posey, Uriah Posey, Eli Posey, Tinsley E. Barber, *née* Posey; James M. Posey, William A. J. Posey, Eliza Allen, *née* Posey, and knows them to be the lineal descendants of John Berryhill.

NATHANIEL BERRYHILL.

Sworn to and subscribed before me this 27th day of July, 1896.

W. J. WATTS,

*Notary Public.*

UNITED STATES OF AMERICA, }  
Indian Territory, Northern Judicial District. }

I, Pearl Eddleman, do solemnly swear that I copied and carefully compared the foregoing eighty-seven pages with the originals of the documents therein contained, and the said eighty-seven pages

100 above is a full, true, and correct copy of the said originals.

All the affidavits among said originals, of which copies are contained in the above eighty-seven pages of printed matter, contained the seals of the officers before whom and by whom all the said several affidavits were sworn.

PEARL EDDLEMAN.

Subscribed and sworn to before me this 26th day of August, 1896.

L. A. FEARS,

*Notary Public.*

[SEAL.]

INDIAN TERRITORY, }  
Northern Judicial Division. }

Now, on this 29th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for and within the Indian Territory, James M. Barber, who, being duly sworn, on his oath states that he is the father of the following-named children: Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber, Mary M. Barber.



Affiant states that the above-named children were upon the census roll of the Creek or Muscogee nation until the year 1895, at which time the names of myself and children were stricken from the roll, and although the affiant has applied to the council of said nation to be reinstalled upon the roll, yet the authorities of said nation have failed and refused to do so.

JAMES M. BARBER.

Sworn to and subscribed before me this 29th — July, 1896.

W. J. WATTS,

*Notary Public.*

COMMITTEE-ROOM, OKMULGEE, I. T., October 20th, 1890.

Hon. National Council.

GENTLEMEN: We, your committee, to whom was referred the application of Benj. A. Barber, Harrison E. Barber, Mariah E. Barber, Eva A. Barber, Bennie Barber, James M. Barber, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl J. Barber, Niles Barber, M. S. Coker, Silas G. Coker, James M. Coker, Robert Coker, Eva Coker, Maud F. Coker, and Hardy J. Barber for citizenship in the Muscogee nation, have carefully considered same and would recommend to your honorable body the adoption of the following act, to wit.

Very respt.,

THOMAS KNIGHT, *Chairman.*

102

Belong to the Broken Arrow town.

Be it enacted by the National Council of the Muscogee nation, That Benj. A. Barber, Harrison E. Barber, Mariah E. Barber, Eva A. Barber, Bennie Barber, James M. Barber, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl J. Barber, Niles Barber, Mary S. Coker, Silas G. Coker, James M. Coker, Rob't Coker, Eva Coker, Maud F. Coker, Hardy J. Barber, be and are hereby declared citizens of the Creek or Muscogee nation by reason of Indian blood.

Adopted.

WARD COACHMAN,

*Pres. H. of K.*

A. P. S., *Clk pro Tem.*

VILLAGE OF WAGONER, CREEK NATION, IND. TER'Y.

Personally appeared before me, a notary public in and for the 1st judicial dist. of the Ind. Ter'y, one G. A. Posey, an acknowledged citizen of the Creek nation, who, being duly sworn, deposeth and says that James Barber's mother was a sister of deponent's father, and that said deponent is an acknowledged citizen of the Creek nation, and believes said James M. Barber to be also a citizen of the Creek nation and entieled to all the rights and privileges of said nation.

103

G. A. POSEY.

Subscribed and sworn to before me on this the 5th day of March, 1894.

JOHN HARVISON,

*Notary Public.*



INDIAN TERRITORY, }  
 Northern Judicial Division. }

Now, on this the 28th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, Joseph Mingo, town chief of Broken Arrow town, who, being duly sworn, on his oath states that he has known James M. Barber for about six years; that on the 20th day of October, 1890, the application of James M. Barber for citizenship in the Creek nation was presented to the house of kings; that said house of kings then referred the same to the committee for investigation. The committee investigated the application and recommended the adoption of the said James M. Barber by reason of blood, and also recommended the house of kings to adopt the same.

That the house of kings did adopt the said James M. Barber by reason of blood, and then referred the application to the house of warriors for action.

104 Affiant further states that before the house of warriors could consider said application that said house of warriors adjourned and postponed action on said application until October, 1891, that being the time of the next regular meeting of the said house of warriors.

That the house of warriors have failed to take any action on said application at the October meeting in 1891, and have never done so the the present time.

Affiant further states that John C. Barber and Robert T. Barber are full brothers of the said James M. Barber and are citizens of the Creek or Muscogee nation, and are so recognized as such, and enjoy all the rights and privileges as citizens of said nation.

That during the year 1891 the said James M. Barber got me to accompany him to L. C. Parryman, principal chief of the Creek or Muscogee nation; that said chief in my presence advised said James M. Barber to go ahead and open up and improve his own farm, and also advised him, Barber, to pick out his man for chief and vote for him, saying that he had a right to vote, and requested his affiant to permit him, the said James M. Barber, to vote at his own town; that was Broken Arrow town.

Affiant further states that he is a full-blood Creek Indian, and is at present town chief of Broken Arrow town; and further states that he believes that James M. Barber is a Creek Indian by blood, and is entitled to all the rights and privileges as a citizen of such nation.

JOSEPH MINGO,

105

Town Chief.

Subscribed and sworn to before me this 28th day of July, 1896.  
 W. J. WATTS,

Notary Public.

INDIAN TERRITORY, }  
 Northern Judicial Division. }

Now, on this the 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public within and for the Indian

Territory, Silas H. Barber, who, being duly sworn, upon his oath states that on December 6th, 1846, he married Sarah A. Posey, who was a daughter of Benjamin and Eliza Posey, who were recognized Creek Indians by blood and descent; that said Eliza Posey's maiden name was Eliza Berryhill. The following-named persons are the sons and daughters of the said Silas H. Barber and Sarah A. Barber, whose maiden name was Sarah A. Posey, now deceased: Male, Robert T. Barber, born December 26th, 1848, 48 years; male, Benjamin A. Barber, born August 25th, 1855, 46 years; male, James M. Barber, born Jan. 17th, 1852, 44 years; male, John C. Barber, born March 20th, 1853, 43 years; female, Martha S. Barber, born Dec. 21st, 1857, 39 years; female, Mary A. Barber, deceased, born Jan. 21st, 1867, 29 years, died leaving one child, Jesse M. Fant.

106 Affiant further states that the foregoing named sons and daughters of Silas H. Barber and Sarah A. Barber are Creek or Muscogee Indians by blood or descent; that the aforementioned Benjamin Posey and Eliza Posey were the grandfather and grandmother of the aforementioned children of Silas H. Barber and Sarah A. Barber, and that the said Benjamin Posey and Eliza Posey were recognized Creek Indians by blood and descent, being, to the best of my knowledge and belief, half-breed Creek Indians or Muscogee Indians.

SILAS H. BARBER.

Sworn to and subscribed before me this 27th day of July, 1896.

W. J. WATTS,  
Notary Public.

VILLAGE OF WAGONER, }  
Creek Nation, I. T. }

Personally appeared before me, a notary public in and for the first judicial dist. of the Ind. Ter'y, one John Posey, an acknowledged citizen of the Creek nation, who, being duly sworn, deposeth and says that James M. Barber is a son of his (Posey's) father's sister, making him a first cousin of the deponent, and that his father is an acknowledged citizen of the Creek nation, and that the said Barber is a citizen of the Creek nation and should be so acknowledged, according to the best of his knowledge and belief.

JOHN M. POSEY.

107 Subscribed and sworn to before me on this 5th day of March, 1894.

JOHN HARVISON,  
Notary Public.

STATE OF TEXAS, }  
County of Limestone. }

Before me, J. H. Vickers, a notary public in Limestone county, Texas, on this day personally appeared R. S. Barber, to me well known, who, being by me duly sworn, states under oath that he, the affiant, is a full brother of S. H. Barber. Affiant further states that

S. H. Barber moved to Texas in the year 1846 and settled in Nacogdoches county, near Lyon Flat, in said county. Affiant further states that soon after his brother (S. H. Barber) came to Texas that he, S. H. Barber, was married to Miss Sarah Ann Posey, who was a daughter of Ben Posey, who was a resident of said Nacogdoches county, Texas. Affiant states further that he (affiant) came to Texas in the year 1854, in the month of March in said year. Affiant states that he stopped at his brother's house when he first came to Texas, and has since that date lived near his brother, S. H. Barber, and has frequently visited him and has been intimately acquainted with the various changes connected with the family of his said brother, S. H. Barber. Affiant further states that at the time he came to Texas, in

the year 1854, his brother had five children, namely,  
 108 to wit, Francis, Tom, Ben, Jim, and John. Affiant states that the last-named (John) was the baby and about five months old when he, affiant, arrived at his brother's house in the year 1854. Affiant states that Jim Barber was about eighteen months or two years old at that date. Affiant further states that his brother, S. H. Barber, had never before been married, and that all the above-named children were full brothers and sisters, having the same father and mother. Affiant further states that Sarah Ann Barber, "the mother of Francis, Tom, Ben, Jim, and John Barber," died about the year 1866 or 1867, or thereabouts. Affiant states further that about one year after the death of Sarah Ann Barber S. H. Barber married his second wife, who was at the time of marriage a Mrs. Elizabeth Stinson, who was Elizabeth Posey, and a full sister of his first wife, "Sarah Ann." Affiant states that there ~~are~~ several children by the marriage of S. H. Barber and Elizabeth Stinson. Affiant states that the said Elizabeth Barber died about the year 1883 or 1884, or thereabouts. Affiant further states that about one year after the death of his, S. H. Barber's, second wife, "Elizabeth Barber," that he, S. H. Barber, married the third time. His ~~his~~ third wife was a Mrs. Pollen, and that she had no children by S. H. Barber.

R. S. BARBER.

Sworn to and subscribed before me this the 29th day of June, 1893.

J. H. VICKERS,  
*Notary Public, Limestone County, Texas.*

109 STATE OF TEXAS, }  
       County of Limestone. }

Before me, J. H. Vickers, a notary public in and for Limestone county, Texas, on this day personally appeared D. M. Prendergast, to me well known, whom, being by me duly sworn, states under oath that he has known R. S. Barber for the last thirty-five years, and knows him to be a truthful and reliable citizen, whose word can be relied upon and accepted in court, and as such commend him to be public.

D. M. PRENDERGAST.

Sworn to and subscribed before me this the 29th day of June, 1893.

J. H. VICKERS,  
*Notary Public, Limestone County, Texas.*

STATE OF TEXAS, }  
*County of Limestone.* }

Before me, J. H. Vickers, a notary public in and for Limestone county, [Texas, on this day personally appeared J. J. Beckham, to me well known, who, being by me duly sworn, states that he has known R. S. Barber for the last twenty years, and knows him to be a truthful and reliable citizen, whose word can be accepted upon any subject as perfectly reliable, and as such I cheerfully commend him to the public.

JOHN J. BECKHAM.

110 Sworn to and subscribed before me this the 29th day of June, 1893.

J. H. VICKERS,  
*Notary Public, Limestone County, Texas.*

UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District,* } ss:

M. A. Posey, who, being by me first duly sworn, doth depose and say that he is a member of the Creek nation, Indian Territory.

That he is a first cousin of John C., Rob't T., B. A., J. M. Barber, and M. S. Coker, by blood.

That his father, Bill Posey, was a full brother by blood to their own mother, Sarah Ann Barber.

He further swears that all of said Barbers above named are one-fourth,  $\frac{1}{4}$ , Creek Indians, and as such are entitled to all the rights and privileges of the Creek nation.

M. A. POSEY.

Subscribed and sworn to before me this 28th day of January, 1896.

MYRA YOUNG,  
*Notary Public.*

111 UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District,* } ss:

Before me, Myra Young, a notary public in and for the northern district in the Indian Territory, personally appeared Mrs. E. H. Allen, a member of the Creek nation of the Indian Territory, who, being by me first duly sworn, doth depose and say:

She is a member of the Creek nation of the Indian Territory; that she is the sister of Sarah Ann Barber, the mother of John C. Barber, Rob't T. Barber, J. M. Barber, M. S. Coker, and B. A. Barber.

Affiant further swears that their mother and her own sister by blood was a  $\frac{1}{2}$  Creek Indian by blood.

That she further swears that she is the own sister of Bill Posey by blood, who was a member of the Creek nation up until August, 1878, when he was shot and killed by the authorities of the said Creek nation of the Indian Territory.

She further swears that the said above-named J. M. Barber, B. A. Barber, and their sister, M. S. Coker, were proven citizens of the Creek nation and were placed upon the census rolls of said nation and are entitled to all the privileges and rights of said nation of Indians as all other members of said nation.

112 She further swears that the mother of said Barbers above named was the daughter of Ben Posey and Eliza Posey, who were each  $\frac{1}{2}$  Creek Indians, and that Eliza Posey prior to marriage was a Berryhill.

MRS. E. H. ALLEN.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.  
MYRA YOUNG,  
Notary Public.

UNITED STATES OF AMERICA, } ss:  
Indian Territory, Northern District, }

Before me, Myra Young, a notary public in and for said district, Indian Territory, personally appeared John C. Barber and Rob't T. Barber, who, being by me first duly sworn, both depose and say that they are members of the Creek nation of Indians.

That they are part Indian by blood and are now recognized citizens of the said nation, in said Territory, and are enjoying all the rights and privileges appertaining to such Indians.

They each further swear that they are full brothers to J. M. Barber, B. A. Barber, and M. S. Barber, who is now the wife of M. L. Coker, having the same father and mother; that they each and all five have  $\frac{1}{4}$  Indian blood in them.

113 They further swear that J. M. Barber has now living six children, to wit, Bettie, Bertie, Johnie, Pearl, Niles, and Pink Barber; that B. A. Barber has now living seven children, to wit, Harrison, Mariah E., Eva A., Ida B., Edward H., Sarah A., and Dora D.; that M. S. Coker, their sister, has now living six children, to wit, Silas, Marquis, Robert, Eva, Maud, and Lenah.

They each further swear that M. S. Coker, their sister, did prove up her rights of such Indian blood and did draw her pay in the year 1891 of the Oklahoma money, amounting to \$29.

The affiants further swear that each of their brothers and sister above described and named did prove their rights and were placed upon the census roll of the Creek nation and were entitled each to have enjoyed all rights and privileges thereunder as citizens until the year 1895, when the authorities of said nation, by their appointed committee, did placed them upon the doubtful list of said members of the said nation.

The affiants further swear that their brothers and sister, as named, are entitled to all the rights of members of and citizens in the Creek nation of the Indian Territory.

They each further swear that they are each related by blood to Bill Posey; that said Bill Posey was their uncle by blood; that said Bill Posey was a member of the Creek nation and was shot by the Creek authorities and killed in August, 1878.

114

JOHN C. <sup>his</sup> x BARBER.  
mark.

RIBERT T. <sup>his</sup> x BARBER.  
mark.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.

MYRA YOUNG,

*Notary Public.*

THE STATE OF TEXAS, {  
Limestone County. }

Before me, the undersigned authority, this day personally appeared Benjamin Posey, to me well known, who, after being duly sworn, says that he is now seventy-six years old, and that he is the father of the following-named children, to wit:

1st. Sarah A. Posey, who was born March 10th, 1825, and married Silas H. Barber, and died, leaving — children.

2nd. Thomas B. Posey, who was born Sept. 14th, 1826; now living.

3rd. Picby Jane Posey, who *who* was born August 13th, 1828; now living.

4th. Benjamin Bell Posey, who was born December 9th, 1829, and died, leaving — children.

5th. John Deacle Posey, who was born May 2nd, 1831; now living.

6th. Martha Alma Posey, who was born Oct. 3rd, 1832; now living, and married — Mayfield.

115 7th. Narcissa Posey, August 2nd, 1834; died without issue.

8th. Uriah Posey was born February 6th, 1836, and died, leaving five children.

9th. Nancy Green Posey was born August 29th, 1837, and married Oswalt and died, leaving two children.

10th. Eli Posey was born March 20th, 1839, and now dead, leaving four children.

11th. Tinsley Elizabeth Posey was born January 31st, 1841, and married John Stinson and died, leaving one child by Stenson.

12th. James Marion Posey was born June 30th, 1842, and died, leaving two children.

13th. George Washington Posey, who was born September the 6th, 1844, died without issue.

14th. William Andrew Jackson Posey was born June 16th, 1846; died, leaving three or 4 children.

Eliza Huldah Posey was born October 9th, 1849, and married Joe Allen; now living.

<sup>his</sup>  
BENJAMIN x POSEY.  
mark.

Sworn to and subscribed before me this 15th day of September,  
A. D. 1882.

S. D. WALKER,  
Co. Clk, Limestone County, Texas.

116 The affidavit of Lucinda Ann Smith, which is in words  
and figures as follows, to wit:

INDIAN TERRITORY, }  
Northern Judicial Division. }

Now, on this 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public within and for the Indian Territory, Lucinda A. Smith, who, being duly sworn, upon her oath states that her name was Lucinda A. Hopwood; that she was well acquainted with Benjamin Posey, he being her own uncle by blood; that Benjamin Posey and his wife, Eliza Posey, whose maiden name was Berryhill, were descendants of John Berryhill; that their father and mother were brothers and sister- to each other. She further states that Benjamin Posey and his wife, Eliza Posey, were half-blood Creek or Muscogee Indians; she further states that she is acquainted with Eliza Allen, *née* Posey, who was a daughter of Benjamin Posey and Eliza Posey. I know that Eliza Allen was a recognized citizen of the Creek or Muscogee nation. I was acquainted with William A. J. Posey, and know him to be a son of Benjamin Posey and brother to Eliza Allen—a full brother. I know that it was generally stated throughout the Creek nation that William Posey was killed by the Creek authorities; I knew Thomas B. Posey, and that he was a son of Benjamin and Eliza Posey. She further states that Benjamin Posey was the father of the following-named persons, and that he proved up their rights as citizens of the Creek or Muscogee nation—said proof was made before Judge Reed, district judge: Sarah A.

117 Barber, *née* Posey; Benjamin B. Posey, Martha Mayfield, *née* Posey; Uriah Posey, Nancy Green Oswalt, *née* Posey; Eli Posey, Tinsly E. Barber, *née* Stinson, *née* Posey; James M. Posey, William A. J. Posey, Eliza H. Allen, *née* Posey; and she further states that the proof was also made for the children of the foregoing parties mentioned. Affiant further states that she is 64 years of age and is a recognized citizen of the Creek or Muscogee nation.

LUCINDA ANN SMITH.

Subscribed and sworn to before me this 27th day of July, 1896.

W. J. WATTS,  
Notary Public.

The affidavit of Mrs. E. H. Allen, John C. Barber, and Rob't T. Barber is in words and figures following, to wit:

118 UNITED STATES OF AMERICA, }  
Indian Territory, Northern District, } <sup>ss</sup>:

Before me, Myra Young, a notary public in and for the northern district, Indian Territory, personally appeared Mrs. E. H. Allen, a



member of the Creek nation, Indian Territory, who, being by me first duly sworn, doth depose and say—

That she is a member of the Creek nation of the Indian Territory; that she is the sister of Eli Posey, the father of G. W. and Willie Posey.

Affiant further swears that their father and her own brother by blood was  $\frac{1}{2}$  Creek Indian by blood.

That she further swears that she is the own sister of Bill Posey by blood, who was a member of the Creek nation up until August, 1878, when he was shot and killed by the authorities of said Creek nation, Indian Territory.

She further swears that the said above-named G. W. and Willie Posey were proven-citizens of the Creek nation and were placed on the census roll of said nation and are entitled to all the rights and privileges of said nation of Indians as all other members of said nation. She further swears that the father of said Poseys above named was the son of Ben Posey and Eliza Posey, who were each  $\frac{1}{2}$  Creek Indians, and that Eliza Posey, prior to marriage, was a Berryhill.

MRS. E. H. ALLEN.

Subscribed and sworn to before me this 28th of January, 1896.

MYRA YOUNG,  
Notary Public.

UNITED STATES OF AMERICA, }  
Indian Territory, Northern District, } ss :

M. A. Posey, who, being first duly sworn, doth depose and say that he is a member of the Creek nation, Indian Territory.

That he is a first cousin of G. W. and Willie Posey by blood.

That his father, Bill Posey, was a full brother by blood to their own father, Eli Posey.

He further swears that all of the said Poseys above named are one-fourth Creek Indians, and as such are entitled to all the rights and privileges as Indians of the Creek nation.

M. A. POSEY.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.

MYRA YOUNG,  
Notary Public.

120 UNITED STATES OF AMERICA, }  
Indian Territory, Northern District, } ss :

Before me, Myra Young, a notary public in and for said district in Indian Territory, personally appeared John C. Barber and Rob't T. Barber, who, being by me first duly sworn, both depose and say that they are members of the Creek nation of Indians; that they are part Indians by blood and are now recognized citizens of said nation in said Territory, and are now enjoying all the rights and privileges appertaining to such Indians. They each further swear that they are first cousins to G. W. and Willie Posey, who each

have Indian blood in them. They further swear that G. W. Posey has three children, to wit: Katie, Annie, and Claude Posey.

They further swear that the father of the above-named Poseys was Eli Posey, uncle to affiants. Affiants further swear that each of their cousins named did prove their rights and were placed upon the census roll of the Creek nation, and were entitled each to have enjoyed all rights and privileges thereunder as citizens until the year 1895, when the authorities of said nation, by their appointed committee, did place them upon the doubtful list of said members of the said nation.

The affiants further swear that Mary Vance, who is recognized as a citizen of the Creek nation, is a sister of the above-named G. W. and Willie Posey, and that the said G. W. and Willie  
121 Posey are entitled to all rights of members of and citizens in the Creek nation, Indian Territory; they each further swear that they are each related by blood to Bill Posey; that said Bill Posey was their uncle by blood; that said Bill Posey was a member of the Creek nation, and was shot by the Creek authorities and killed in August, 1878.

his  
JOHN C. x BARBER.  
mark.  
ROBT T. x BARBER.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

The affidavit of Shelton Smith is in words and figures following, to wit:

122 INDIAN TERRITORY, }  
*Northern Judicial Division.* }

Now, on this 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public within and for the Indian Territory, Shelton Smith, who, being duly sworn, upon his oath states that he was acquainted with Benjamin Posey and Eliza Posey, his wife, and that they were recognized as Creek or Muscogee Indians by blood and descent; that he was present at the time when Benjamin Posey proved up the rights of his children before Judge Reed, who was judge of the Okmulgee district, in the Creek or Muscogee nation, according to law.

The following-named persons are the sons and daughters of Benjamin Posey, whose rights were proven up by the said Benjamin Posey before Judge Reed, as above stated; the rights were acquired through blood and not adoption: Sarah A. Barber, *née* Posey; Thomas B. Posey, Benjamin B. Posey, Martha A. Mayfield, *née* Posey; Uriah Posey, Nancy G. Oswalt, *née* Posey; Eli Posey, Tinsley E. Stinson, *née* Barber, *née* Posey; James M. Posey, William A. J. Posey, Eliza H. Allen, *née* Posey.

SHELTON SMITH.

Subscribed and sworn to before me this 27th day of July, 1896.

W. J. WATTS,  
*Notary Public.*

The affidavit of Mary E. Vance is in words and figures following, to wit:

123      INDIAN TERRITORY,      {  
            *Northern Judicial Division.*      }

Now, on this 28th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, Mary E. Vance, who, being duly sworn, on her oath states that she is well acquainted with Jennie Johnson, George W. Posey, and William Posey, and knows them to be the lawful sons and daughters of Eli Posey. Affiant further states that she, Mary Vance, is a sister to Jennie Johnson, George W. Posey, and half-sister to Willie Posey, and is a recognized Creek or Muscogee Indian.

MARY E. VANCE.

Sworn to and subscribed before me this 28th day of July, 1896.

W. J. WATTS,  
*Notary Public.*

The affidavit of Hugh Johnson and certificate of L. C. Perryman are in words and figures as follows, to wit:

124      UNITED STATES OF AMERICA,      {  
            *Indian Territory, Northern Judicial District.*      }

Now, on this the 4th day of August, 1896, personally appeared before me, W. J. Watts, a notary public in and for said district and Territory, Hugh R. Johnson, who, being duly sworn, on his oath states that he is the husband of Jennie Johnson, daughter of Eli Posey, and a resident of the Creek nation, where he and his wife have lived for the past ten years; that his wife's name is upon the census roll of 1890 of Broken Arrow town, in said Creek nation, and that she drew annuity money from the United States as a Creek Indian by blood; that she was and has always been recognized as a Creek Indian by blood. Affiant states that the certificate hereto attached and signed L. C. Perryman, as principal chief of the Muscogee nation, is a true and perfect copy of the original which affiant obtained from said chief in person, and was present when said copy was made from said original, and the affiant examined and compared the copy hereto attached with the said original, and the said hereto attached — is in exact words and figures as the original, which original is in the possession of H. O. Sheppard, attorney-at-law, Muscogee, Ind. Ter., who refuses to surrender the said original to this affiant, although he has demanded the same of him.

HUGH R. JOHNSON.

Sworn to and subscribed before me this 4th day of August, 1896.

W. J. WATTS,  
*Notary Public.*

125

EXECUTIVE OFFICE,  
TULSA, IND. TER., *December 5th*, 1892.

This — to certify that Jinney Johnson and her children, Clarence, Fauny, and T. D. Johnson, are on the rolls of the Broken Arrow town, upon the certified rolls, and are entitled to *per capita* payment as Creeks.

(Signed)  
[SEAL.]

L. C. PERRYMAN,  
*Prin. Chief, M. N.*

OKMULGEE, I. T., *Oct. 4th*, 1895.

I certify that the above is a true and exact copy of the original certificate shown to me this day and by me copied as above.

FRED A. PARKINSON,  
*Notary Public.*

The affidavit of Joseph Mingo is in words and figures as follows, to wit:

126 INDIAN TERRITORY, }  
Northern Judicial District. }

Now, on this 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, Joseph Mingo, who, being duly sworn, states that he is acquainted with Jennie Johnson, and knows that she was on the rolls and received *per pro rata* part of her money from the Creek or Muscogee nation in the year 1891.

JOSEPH MINGO.

Sworn to and subscribed before me this 27th day of July, 1896.  
W. J. WATTS,  
*Notary Public.*

The affidavits of John C. Barber, Robert T. Barber, and Mrs. E. H. Allen and M. A. Posey are in words and figures as follows, to wit:

127 UNITED STATES OF AMERICA, }  
Indian Territory, Northern District, } ss:

Before me, Myra Young, a notary public in and for said district, in Indian Territory, personally appeared John C. Barber and Rob't T. Barber, who, being by me first duly sworn, both depose and say that they are members of the Creek nation of Indians; that they are part Indian by blood, and are now recognized citizens of the said nation in said Territory, and are enjoying all the rights and privileges appertaining to such Indians; they each further swear that they are first cousins to Ben, Lula, Trudy, & Ambrose Posey; that they each have Indian blood in them; they further swear that the above-named Ambrose Posey has one child, Tommie; they further swear that the father of the above-named Posey was Uriah Posey, uncle to affiants.

The affiants further swear that each of their cousins above named

did make application to prove their rights and were placed on the census roll of the Creek nation and were entitled each to have enjoyed all rights and privileges thereunder as citizens until the year 1895, when the authorities of said nation, by their appointed committee, did place them upon the doubtful list of said members of the said nation.

The affiants further swear that their cousins, as named, are 128 entitled to all the rights of members of and citizens in the Creek nation of the Indian Territory; they each further swear that they are each related by blood to Bill Posey; that said Bill Posey was their uncle by blood; that said Bill Posey was a member of the Creek nation and was shot by the Creek authorities and killed in August, 1878.

his  
JOHN C. x BARBER.  
mark.

his  
ROBERT T. x BARBER.  
mark.

Subscribed and sworn to before me this 28th day Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

UNITED STATES OF AMERICA, } ss:  
Indian Territory, Northern District, }

Before me, Myra Young, a notary public in and for the northern district, Indian Territory, personally appeared Mrs. E. H. Allen, a member of the Creek nation of the Indian Territory, who, being by me first duly sworn, doth depose and say

129 That she is a member of the Creek nation, Indian Territory; that she is a sister of Uriha Posey, the father of Ben, Lula, Trudie, and Ambrose Posey.

Affiant further swears that their father and her own brother by blood was  $\frac{1}{2}$  Creek Indian by blood.

That she further swears that she is the own sister of Bill Posey by blood, who was a member of the Creek nation up until August, 1878, when he was shot and killed by the authorities of said Creek nation, Indian Territory.

She further swears that the above-named Ben, Lula, Trudie, and Ambrose Posey were proven citizens of the Creek nation, and were placed upon the census roll of said nation, and are entitled to all the privileges and rights of said nation of Indians as all other members of said nation.

She further swears that the father of said Poseys above named was the son of Ben Posey and Eliza Posey, who were each  $\frac{1}{2}$  Creek Indians, and that Eliza Posey, prior to marriage, was a Berryhill.

MRS. E. H. ALLEN.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

130 UNITED STATES OF AMERICA, } ss:  
*Indian Territory, Northern District,*

M. A. Posey, being by me first duly sworn, doth depose and say that he is a member of the Creek nation, Indian Territory.

That he is a first cousin of Ben, Lula, Trudie, and Ambrose Posey by blood.

That his father, Bill Posey, was a full brother by blood to their own father, Uriah Posey.

He further swears that all of the said Poseys above named are one-fourth Creek Indians, and as such are entitled to all the rights and privileges as Indians of the Creek nation.

M. A. POSEY.

Subscribed and sworn to before me this 28th of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

The affidavits of Mrs. E. H. Allen, M. A. Posey, John C. Barber, and Robert T. Barber are in words and figures as follows, to wit:

131 UNITED STATES OF AMERICA, } ss:  
*Indian Territory, Northern District,*

Before me, Myra Young, a notary public in and for said northern district, in the Indian Territory, personally appeared Mrs. E. H. Allen, who, being first duly sworn, doth depose and say:

That she is a member of the Creek nation of the Indian Territory; that she is the sister of Tinsley E. Stinson, the mother of Mollie F. Stinson, the wife of Thomas Stockton.

Affiant further swears that her mother and her own sister by blood was  $\frac{1}{2}$  Creek Indian by blood.

That she further swears that she is the own sister of Bill Posey by blood, who was a member of the Creek nation up until August, 1878, when he was shot and killed by the authorities of the said Creek nation, Indian Territory.

The further swears that the above-named Mary F. Stinson, wife of Thomas Stockton, was proven a citizen of the Creek nation, and was placed upon the census roll of said nation, and is entitled to all the privileges and rights of said nation of Indians as all other members of said nation.

She further swears that the mother of said Mary F. Stockton was the daughter of Ben Posey and Eliza Posey, who were each  $\frac{1}{2}$  Creek Indians, and that Eliza Posey, prior to her marriage, was a Berryhill.

MRS. E. H. ALLEN.

132 Subscribed and sworn to before me this 28th day of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District,* } ss:

M. A. Posey, who, being first duly sworn, doth depose and say that he is a member of the Creek nation, Indian Territory.

That he is a first cousin of Mary F. Stockton by blood; that his father, Bill Posey, was a full brother by blood to her own mother, Tensy Elizabeth Barber.

He further swears that Mary Stockton, above named, *are* one-fourth Creek Indians and as such *are* entitled to all the rights and privileges as Indians of the Creek nation.

M. A. POSEY.

Subscribed and sworn to before me this 28th of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

133 UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District,* } ss:

Before me, Myra Young, a notary public in and for said district, in Indian Territory, personally appeared John C. Barber and Rob't T. Barber, who, being by me first duly sworn, both depose and say that they are members of the Creek nation of Indians.

That they are part Indian by blood, and are now recognized citizens of the said nation in said Territory, and are enjoying all the rights and privileges appertaining to such Indians.

They each further swear that they are first cousins to Mollie F. Stinson, now Mrs. Thomas Stockton, who is the daughter of Tensy E. Stinson by her first husband, John Stinson, and said Mrs. Stinson, who was the sister of their mother, Sarah Ann Barber.

That said Mollie E. Stinson has three children—Harry, Roy, and Grover Stockton.

The affiants further swear that their cousin above named did prove her right and was placed on the census roll of the Creek nation and was entitled to have enjoyed all the rights and privileges thereunder as a citizen until the year 1895, when the authorities of said nation by their appointed committee did place her upon the doubtful list of said members of the said nation.

134 The affiant further swears that their cousin, as named, is entitled to all the rights of members of and citizens in the Creek nation, Indian Territory.

They each further swear that they are related by blood to Bill Posey; that said Bill Posey was their uncle by blood; that said Bill Posey was a member of the Creek nation and was shot by the Creek authorities and killed in August, 1878.

his  
 JOHN C. x BARBER.  
 mark.

his  
 ROB'T T. x BARBER.  
 mark.



Subscribed and sworn to before me this 28th day of January, 1896.

MYRA YOUNG,  
*Notary Public.*

INDIAN TERRITORY, }  
*Northern Judicial Division.* }

Now, on this 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for and within the Indian Territory, Silas H. Barber, who, being sworn, upon his oath states: Tinsly E. Posey was married to John Stinson in 1862; that she had two children by said John Stinson—Mollie F. Stinson, female, born Oct. 17th, 1863, ago- 32 years, and George W. Stinson, male, born July 15th, 1867, aged 29 years. John Stinson died in 1868;

135 that during the year of 1868 said Tinsly E. Stinson married Silas H. Barber, the said Tinsly E. Barber being a full sister to Sarah H. Barber, *née* Posey. Affiant further states that said Tinsly E. Barber was a daughter of Benjamin Posey and Eliza Posey, who were recognized Creek or Muscogee Indians by blood and descent.

SILAS H. BARBER.

Subscribed and sworn to before me this 27th day of July, 1896.

W. J. WATTS,  
*Notary Public.*

The affidavit- of E. H. Allen, Thomas Barber, John Barber, and Silas H. Barber are in words and figures as follows, to wit:

136 INDIAN TERRITORY, }  
*Northern Judicial Division.* }

Now, on this 28th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, Eliza H. Allen, Thomas Barber, John Barber, and Silas H. Barber, who, being duly sworn, on their oaths state that they are well acquainted with Mollie Stockton and know her to be the daughter of John Stinson and Tinsly E. Stinson, *née* Posey, she being a daughter of Benjamin Posey and Eliza Posey. Affiants further state that they have been recognized as citizens of the Creek nation.

E. H. ALLEN.

his  
THOMAS x BARBER.  
mark.

his  
JOHN x BARBER.  
mark.

SILAS H. BARBER.

Sworn to and subscribed before me this 28th day of July, 1896.

W. T. WATTS,  
*Notary Public.*

The affidavit of John C. Barber, Robert T. Barber, and Joseph Mingo are in words and figures as follows, to wit:

137 INDIAN TERRITORY, }  
Northern Judicial District. }

Now, on this 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public within and for the Indian Territory, John C. Barber, Robert T. Barber, and Joseph Mingo, town chief, who, being duly sworn, upon their oaths state that they were well acquainted with Martha S. Coker and know that she did in February, 1819, draw her proportional part of money from the Creek nation as a citizen of such nation.

his  
JOHN x C. BARBER.  
mark.

his  
ROBERT x T. BARBER.  
mark.

JOSEPH MINGO.

Subscribed and sworn to before me this 27th day of July, 1896.

W. J. WATTS,  
Notary Public.

The affidavit of Joseph Mingo, which is in words and figures as follows, to wit:

138 INDIAN TERRITORY, }  
Northern Judicial Division. }

Now, on this 28th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, Joseph Mingo, who, being duly sworn, upon his oath states that he is well acquainted with Robert T. Barber, John C. Barber, and Mary Vance and knows them to be credible witnesses, and also states that they are recognized citizens of the Creek or Muscogee nation and at present members of my town.

JOSEPH MINGO,  
Chief Broken Arrow Town.

Subscribed and sworn to before me this 28th July, 1896.

W. J. WATTS,  
Notary Public.

The affidavit of J. M. Allen, E. H. Allen, Thomas Barber, and John Barber is in words and figures as follows, to wit:

139 INDIAN TERRITORY, }  
Northern Judicial Division. }

Now, on this 28th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, J. M. Allen, Eliza H. Allen, Thomas Barber, John Barber, who, being

duly sworn, on their oaths state that they are well acquainted with Jennie Johnson and know her to be the lawful daughter of Eli Posey.

J. M. ALLEN.

E. H. ALLEN.

his  
THOMAS x BARBER.  
mark.

her  
JOHN x BARBER.  
mark.

Sworn to and subscribed before me this 28th day of July, 1896.

W. J. WATTS,  
*Notary Public.*

The affidavits of Mrs. E. H. Allen, M. A. Posey, John C. Barber, Robert T. Barber, and Silas H. Barber are in words and figures as follows, to wit:

140 UNITED STATES OF AMERICA, }  
Indian Territory, Northern District, } ss.

Before me, Myra Young, a notary public in and for the northern district, Indian Territory, personally appeared Mrs. E. H. Allen, a member of the Creek nation, Indian Territory, — being by me first duly sworn, doth depose and say:

She is a member of the Creek nation of the Indian Territory; that she is the sister of Tinsley Elizabeth Barber, second wife of S. H. Barber, who was the widow of John Stinson, whose maiden name was Posey, and who is the mother of R. F. Barber, R. W. Barber, H. J. Barber, and L. E. Barber.

Affiant further swear- that their mother and her own sister by blood was  $\frac{1}{2}$  Creek Indian by blood.

That she further swears that she is the own sister of Bill Posey by blood, who was a member of the Creek nation up until August, 1878, when he was shot and killed by the authorities of said Creek nation, Indian Territory.

She further swears that the said above-named R. F., R. W., H. J., and L. E. Barber were proven citizens of the Creek nation, and were placed upon the census roll of said nation, and are entitled to all the privileges and rights of said nation of Indians as all other members of said nation.

141 She further swears that the mother of said Barbers above named was the daughter of Ben Posey and Eliza Posey, who were each  $\frac{1}{2}$  Creek Indians, and Eliza Posey, prior to her marriage, was a Berryhill.

MRS. E. H. ALLEN.

Subscribed and sworn to before me this 28 day of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District.* }

M. A. Posey, who, being by me first duly sworn, doth depose and say that he is a member of the Creek nation, Indian Territory.

That he is a first cousin of R. F., R. E., H. J., and L. E. Barber by blood.

That his father, Bill Posey, was a full brother by blood to their own mother, Tinsley Elizabeth Barber.

He further swears that all of said Barbers above named are one-fourth Creek Indians, and as such are entitled to all the rights and privileges as Indians of the Creek nation.

M. A. POSEY.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.

MYRA YOUNG,  
*Notary Public.*

142 UNITED STATES OF AMERICA, }  
*Indian Territory, Northern District.* }

Before me, Myra Young, a notary public in and for said district, in the Indian Territory, personally appeared John C. Barber and Rob't T. Barber, who, being by me first duly sworn, both depose and say that they are members of the Creek nation of Indians, that they are part Indian by blood, and are now recognized citizens of the said nation, in said Territory, and are enjoying all the rights and privileges appertaining to said Indians.

They each further swear that they are half-brothers to R. F. Barber, R. W. Barber, H. J. Barber, and L. E. Barber, having the same father, but different mothers, their mother being Tinsley Elizabeth Barber, second wife of S. H. Barber and the widow of John Stinson, whose maiden name was Posey, and that they each have one-fourth Indian blood in them. They further swear that H. J. Barber has one child, Jessie J. They each further swear that R. W. Barber and R. F. Barber did prove up their rights of such Indian blood and did draw their pay, in the year 1891, of the Oklahoma money, amounting to \$29 00 each.

Affiants further swear that each of their brothers above described and named did prove their rights and were placed upon the census roll of the Creek nation and were entitled each to have enjoyed all rights and privileges thereunder as citizens until the year 1895,

143 when the authorities of said nation, by their appointed committee, did place them upon the doubtful list of said members of said nation. They further swear that their brothers are entitled to all the rights of members of and citizens in the Creek nation of the Indian Territory. They each further swear that they are related by blood to Bill Posey; that said Bill Posey was their uncle by blood; that said Bill Posey was a member of the Creek

nation, and was shot by the Creek authorities and killed in August, 1878.

his  
JOHN C. x BARBER.  
mark.

his  
ROB'T T. x BARBER.  
mark.

Subscribed and sworn to before me this 28th day of Jan'y, 1896.  
MYRA YOUNG,  
*Notary Public.*

INDIAN TERRITORY, }  
Northern Judicial Division. }

Now, on 27th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for and within the Indian Territory, Silas H. Barber, who, being duly sworn, upon his oath states: On — —, 1868, he married Tinsley E. Stinson, whose maiden name was Tinsley E. Posey, she being a sister of my former wife, Sarah A. Barber, whose maiden name was Sarah A. Posey; that the 144 said Tinsley E. Barber, *née* Stinson, *née* Posey, was a daughter of Benjamin Posey and Eliza Posey, who were half-breed Creek or Muscogee Indians.

Affiant further states that the following-named persons are the sons of Silas H. Barber and Tinsley E. Barber:

Twins { Richmond F. Barber, born Aug. 16, 1869, age 27.  
Richard W. Barber, " " " " "  
Hardy J. Barber, " July 2nd, 1872, " 24.  
Lafayette E. Barber, " May 18th, 1874, " 22.

Affiant further states that the foregoing-named sons of Silas H. Barber and Tinsley E. Barber are Creek or Muscogee Indians by blood and descent; that Benjamin Posey and Eliza Posey were the grandfather and grandmother of the aforementioned children of Silas H. Barber and Tinsley E. Barber, and that the said Benjamin Posey and Eliza Posey were, to the best of his knowledge and belief, half-blood Creek or Muscogee Indians.

SILAS H. BARBER.

Subscribed and sworn to before me this 27th day of July, 1896.  
W. J. WATTS,  
*Notary Public.*

145 INDIAN TERRITORY, }  
Northern Judicial Division. }

Now, on this 28th day of July, 1896, personally appeared before me, W. J. Watts, a notary public for the Indian Territory, Joseph Mingo, who, being duly sworn, states that Richmond F. Barber — Richard W. Barber were on the census rolls of the Creek nation. He further states that Richmond F. Barber and Richard W. Barber drew their proportional part of their money from the Creek nation in 1891.

JOSEPH MINGO.

Sworn to and subscribed before me this 28th July, 1896.

W. J. WATTS,  
Notary Public.

The evidence taken before the special master, N. A. Gibson, is in words and figures as follows, to wit:

146 In the United States Court in the Indian Territory, Northern District, at Muscogee.

JENNIE JOHNSON ET AL. }  
vs. } #56.  
CREEK NATION.

The testimony of witnesses on the part of the appellants in the above cause, taken before me, the undersigned special master, at my office, in Muscogee, I. T., in pursuance of the attached notice, that appellants appearing by attorney and in person and the appellee not appearing, but filing, through its attorney, the attached protest.

GEORGE TIGER, being duly sworn, says:

Q. 1. State your name, age, and residence.

A. My name is George Tiger; my age, about 41. I live two miles west of Eufaula.

I am Creek Indian of the full blood. I am a Creek lawyer and have held different positions in the nation. First, I was a member of the house of kings, then a member of the house of warriors, then a member of a commission on citizenship matters. I acted as chairman in citizenship matters. I was district judge *pro tem*. I am acquainted with James M. Barber. I am pretty well familiar with the act of the Creek council known as the alien act. The intention of the alien law when passed was this: It was based upon sec. 4 of the treaty of 1832.

147 This sec. debarred those Indians back in Alabama who remained and took a patent from the United States Government.

Art. 4 says: "At the end of five years all the Creeks entitled to these selections and desirous of remaining shall receive patents therefor in fee simple from the United States."

This 4th art. refers to the 2nd art. of the same treaty.

I was a member of the citizenship commission of five in the year 1896. While the commission was in session the alien law came up and barred the people from being admitted to citizenship who had established their Creek blood. The question was submitted to the supreme court of the Creek nation for a decision as to the law, and that said court decided that it applied to those of the Creek people who had taken their patents from the United States in Alabama and who had not put their foot on Creek soil here for 21 years. There — some cases before the citizenship commission in the year 1895 which had been decided and certificates issued to them by Chairman Colbert, stating that the parties had complied with the

requirements of the law for admission to citizenship in the Creek nation, but that they were debarred from admission by the alien act. These cases caused the question to be submitted to the supreme court, and after the decision or interpretation of the law, as applying to the Creeks back in Alabama who had never put their foot on Muscogee soil, all those who *who* had such certificates were admitted by me as acting chairman. I could do nothing else. One of these cases was Mrs. Throckmorton, another Dr. Turvin, another Otho

Durant, another the Thompson-Rowley family; the next was 148 Tom Grayson. These five families held certificates from Colbert, and after the barrier was removed I had to admit them.

Colbert made a report to the council afterwards and the council approved all of them except the Thompson-Rowley case. It was simply prejudice, that was all. The evidence was all correct. I was sent for by the committee having the matter in charge and made a statement as to how the matter was, and the committee simply ignored it. The others were all O Kd.

They are enrolled on the town rolls today.

I was a member of the house of warriors in the year 1895 and was one of the 12 members of that house who were appointed upon the committee of eighteen.

When that committee held its meetings no summonses were issued and no testimony was taken. The chairman held that no investigation was to be had, but we were there only to reject. If one member objected to citizens of the town of another member, then he, in order to get even, would object to a number of citizens of the first man's town. That is the way the matter was carried on. Members objected to citizens whom they did not know at all; 96 were rejected in my town by a man who did not know them. These parties had been born and raised in my town and had always been citizens, but this old man had them rejected. When their cases were investigated by the commission of five they were all put back on the rolls. All the people in the Barber and Posey case (Jennie Johnson *et al.*) were rejected at that time. I had known Barber for a long time before that. W. T. Morgan, Mary Wassom, and others were struck off at that time. The persons struck off by the

149 committee were all on the Creek rolls that had been approved by the council before that time.

JENNIE JOHNSON ET AL. }  
vs.  
CREEK NATION. }

NAPOLÉON B. CHILDERS, a witness for appellants, being first duly sworn, says:

I am 53 years old. I live in the Creek nation. Wagoner is my post office. I am a citizen of the Creek nation. I am judge of Coweta district of the Creek nation. I have held this position most of the time for 10 years. In the years 1892 of 1893, while I was judge of Coweta district, I got an order from L. C. Peryman, who was then principal chief of the Creek na-



tion, to investigate the citizenship of the Barbers and Poseys, who lived near Wagoner. There had been some report made to him about them, and he wanted the matter investigated by me. Complaint had been made to him that the Barbers and Poseys were going into some contract pastures and making farms, and that they were not citizens. When I got the notice from him I notified Jim Barber and the others, through my officer, to meet me at the court-house on a certain day with their evidence, and they met me on that day, and I held the investigation. I notified Joe Mingo, who was the chief of Broken Arrow town, to which these parties claimed to belong, to be there, and he was present on the day. I took the testimony of the witnesses that they produced there—citizens. I questioned the witnesses closely myself, and the evidence went to show that  
150 they were citizens and had a right there. The evidence is on the record. I then had a talk with Mingo, and he informed me that they had had the same evidence all the time, and that they were entitled to citizenship, and for that reason he had them on his town rolls. I then made a report to the chief to the effect that they had a right there as citizens. That seemed to settle the question, and they remained there as constituents of Broken Arrow town, and the town chief kept them on his rolls until they were taken off the rolls. I recognized them as citizens until they were taken off the rolls.

Our chiefs have always held that it was the duty of the district judges to settle the question of citizenship of persons in their districts. I succeeded Judge Wesley Tiger, and have his records. I have all of the records of the Coweta district court. The record book that was made under Judge Tiger, when Lewis McHenry was his clerk, is here; all the fore part is torn out; about one-third of the book is torn out.

This record book is made an exhibit to this testimony, marked Exhibit A.

It was the custom for a great many years for the town chief to keep a roll of the citizens of his town, and when he came to the council no question was made as to the names on the roll. This custom was in full force until a few years ago; I can't tell exactly how long ago. There was no change in this custom until the chiefs of the different towns began to scratch the rolls of each other's towns.

151 This brought on conflicts among them, and the matter was taken into council, and the council began to legislate about it.

There has been no positive law, as far as I know, repealing this custom. If there had been such a law it would have been the duty of the principal chief to communicate it to the judges. Some hold that it is the duty of the judges to pass on these citizenship matters, and some hold that it is not. Several years ago the question came up in the council of which I was a member at that time as to who should draw the payment that was to be made. Finally, the committee of 18 was appointed to investigate the rolls. When the committee investigated the rolls they did not notify the parties whom

they were investigating. They took up the different names, and if they thought they should not be on the rolls the names were scratched off. I was before that committee several times. The Barbers and Poseys were scratched off at that time, and also Morgan, Wassom, Perry, and a whole lot of others. The roll from which these parties were scratched was the legal roll of the Creek nation.

I was twice summoned before the citizenship commission of five at Okmulgee in the case of the Barbers and Poseys. I was there both times, but was not called on the stand either time. They never had any trial either time I was summoned there.

After the decision of Judge Adams in regard to the alien law, I, with a great many others, considered that the law was of no  
152 effect, because they went right straight and took in some that it had gone against.

And further deponent saith not.

JOSEPH MINGO, a witness for the appellants, being duly sworn, upon his oath says:

My name is Joseph Mingo; my town is Broken Arrow town. I am king of that town; it is one of the 47 towns of the Creek nation. I am a full-blood Creek Indian. I have been king of that town since 1883, with the exception of two years, when I resigned to be judge, and at the expiration of that time I was re-elected and am still in that position. Before my time there was a Creek Indian by the name of Bill Posey who left the Creek nation and afterward came back and proved up his rights and was readmitted to citizenship, and his sister, Mrs. Allen, came back to the nation and proved up her rights; then their connections came in and proved up their rights. Some of them came in after I became town king, but they started before my time. When Bill Posey came back I was not an official of the town, but was present, and there were some old members of the town who knew him, and he saw Posey readmitted to citizenship on the recognition of these old members of the town. Before Mrs. Allen came back the council had passed a law requiring all applicants to prove up their rights to citizenship before a district judge of the nation. My town king, who was a full-blood, asked me to look after the matter, as I had charge of the rolls and could write, and Mrs. Allen went before Judge Reed, of Muscogee district, and proved up her rights as the sister of Bill Posey and  
153 the daughter of a full-blood Creek Indian who had gone away from the Creek nation.

Afterwards the council passed an act repealing the act which required the district judge to pass upon these citizenship cases.

Then an act and resolution was passed by the council requiring each town king to make a correct roll of his own town. At that time I was elected town king of the Broken Arrow town, and I noticed this act authorizing each town king to make a correct roll of his town. In making the roll I found that Jim Barber's mother was a full sister of Mrs. Allen, but had come back after the repeal of the

act authorizing them to prove up their rights before the judge, and I deemed it my duty in order to make a true and correct roll of my town. If Mrs. Allen was a citizen that her sister was also a citizen; that it was satisfactory to the law that I should pass upon these people's rights in order to get a correct roll of the town, and therefore I enrolled them in my town.

At the time I was enrolling them Mary Stockton came up, and though her maiden name was a little different, they proved that she was of the same family, and so I enrolled her. I had the roll made up as correctly as I could with these names on it, and it was submitted to the council and the roll approved and it was considered an authentic roll of the Creek nation. Then, in the meantime, I had resigned my position as town king to accept the position of judge of Coweta district. A new man was appointed town king in my stead. The council, following my resignation as town king, made an appropriation to pay out some *per capita* money.

154 Then there was a committee appointed by the council consisting of the members known as the eighteen committee to look over the rolls that were in the hands of the town kings, and I have found since that there were a great number of the members of my town that were scratched off by this committee. I came to the council then while this was in progress and inquired of the officials of the town at that time how come the names of these parties to be scratched off the rolls. I found out that these new officials, not knowing these parties as well as I did and their status when objections were raised against them, were unable to set up proof as to their citizenship. After that there was a bond required for them to have a hearing in court. Knowing their status as I did, I went on their bonds for costs, but they have failed to have their day in court to this date. I know all the older members of the family. They were Mollie Stockton, James Barber, George A. Posey, George Eli Posey, and a number of other- whose names were struck off. They struck off the whole family.

In the meantime, before Jim Barber came back, his brothers, Tom and John Barber, came to the nation and made an application to the council that they were Indians by blood, and the council referred their application to their committee on citizenship. There they proved satisfactorily to the committee that they were Creek Indians by blood. The committee reported favorably and they were accepted by the council. The acts of the council could be found on the docket.

155 There was an incident where L. C. Perryman, the principal chief, ordered Judge Childers to investigate the status of Jim Barber and his connection. Judge Childers called on me and took evidence as to their status. After taking my evidence and that of all the parties he could find he told me, not in court, according to the evidence they could not be deprived of their rights unless other evidence was presented setting aside the evidence that had been given in. They were undoubtedly citizens, but he did not deem it the authority of the court to pass upon citizenship cases, but that he was going to report to the chief with a copy of the evi-

dence and his opinion in all the cases; but as to the disposition of the case I know no further. I have been acquainted with this family before my time as town king when I had nothing to do with the affairs of the town, and I know that they are of the same family and closely related, but while John and Tom Barber show more Indian about them, Jim Barber and the others that have been scratched off show more like white people than the other- did.

Among the full-bloods of the council it appeared to them and there were rumors circulated during the council that Jim Barber and the others were only half-brothers of Tom and John Barber because of their being kept out of their rights up to date. It was on account of their looking like white people.

The history of these parties going off and coming back, my old folks have never lost trace of these people, but the cause of their leaving this country was that before the constitution was adopted, according to the customs and laws among the Indians at that day,

156 *was* if any Indians were to marry any of their relations, no matter how distant, their ears and noses should be cut off;

that the parties married relations and had to leave on that account. Jackson Doyle, Haney, and George Stidham were the witnesses that knew these people before they went away and recognized them when they come back. They have never been looked upon as lost people. When Bill Posey and Mrs. Allen and the others came back these old folks were still living and were the principal witnesses in this case. At present there is not one of those old folks living.

And further deponent saizeth not.

ELLIS CHILDERS, a witness for the appellants, being be me first duly sworn, upon his oath says:

My name is Ellis Childers. I am a citizen of the Creek nation by blood. I have held a number of official positions in the Creek nation.

I am familiar with the methods of establishing rolls in the Creek nation for the past 10 years. I have been chief of the Cheyaha town for the past ten years, and have had control of the town and making up the rolls of the town for that time. There are 47 towns in the Creek nation. The town chief and the town king make up the rolls, and the town kings presents the rolls to the chief whenever he calls for it. There is a standing law that each town shall make a roll of its own members. Under the law the king and the chief have the authority to make up the rolls of their town.

157 The first citizenship law that I know of was that the different district judges had the right to pass upon the questions of disputed citizenship.

I was speaker of the house of warriors at the time the eighteen committee was appointed, and as such appointed the members of that committee who came from the house of warriors. That was in 1894 or 1895.

There was some money to be paid out *per capita*, and the council appointed this committee to examine the rolls. Every town king

had to present his rolls to this committee; then the act authorized that if any one reliable citizen objected to any person on the rolls of any town that the committee should strike the names of such person off the roll for further investigation.

This committee was not instructed to go into details and get evidence to find out whether the persons objected to were really not citizens, but they were to strike off the names of any person objected to, and then the person was to be notified and given a chance to show that he was really entitled to citizenship.

It got to be kind of a trade for a while striking off people and getting employment from them to get them back on the rolls.

There were about 200 struck off the roll.

I was town chief at the time and also speaker of the house. I do not remember whether my father, N. B. Childers, or Charlockkee, was town king at the time. I was informed, as the custodian of the

rolls of Cheyaha town, that a number of my people had been  
158 struck off the rolls. There were the Smiths the Evans', Mr.

John Jordan's children, and Mr. Rulison's wife and the children; so, placing a *pro tem.* speaker in my place, I took my position before the committee and staid there with them for a week. Then I found out that Taylor Chisso, then town chief of Broken Arrow town, who had been in Muscogee for several years, and George Lovett, a member of the house of warriors from the same town, and Gabriel Jamison, then the town king of Arkansas town, who lived near Muscogee and claimed to be acquainted with these people, had stated that these parties were Cherokees and not Creeks. This objection had knocked these people off my rolls. I went to these parties and told them the condition of my people and tried to get them to understand the matter, but could get no satisfaction out of them. It being my duty to look after the interest of my town, I went before the committee and staid there a week with them.

The Broken Arrow town was brought up first, and finally they struck the Barbers and Poseys. I am well acquainted with the family and knew their connection, and I made an objection to Jim Barber and George Eli Posey and the Coker family and the Stocktons and a number of others. I tried to make an objection to half of them, but do not know whether I got half of them or not. Then I commenced on Gabriel's town and I objected to Wassom's wife and Morgan and several others—Perry and a whole lot of them. Then I began on Spring town and knocked Clarence Turner's family off. I was trying to get my revenge.

The committee took my word and scratched them off.

Those were the legal rolls of the Creek nation. After I  
159 done that I tried to get my people back. I did not object to these parties because I did not think that they were citizens, but I wanted to get my people back on and tried to get a compromise and have the kings let my people back, and then I would have withdrawn my objections and let the parties back to whom I had objected. Finally I got all my people on except the Smiths, but I had to resort to other means.

These people were not notified and were given no chance to prove

their rights. These parties have been considered citizens both before and after that time. They have exercised the rights of citizenship and have been tried in our courts and forced to do public duties. I summoned Posey, Morgan, and Barber as militia when I was the captain of the militia in the Cook gang troubles.

The supreme court decided that the alien act was unconstitutional and that the council could not pass an act depriving any persons with Creek blood of their interests in the land.

I was presiding officer of the council at the time the alien act was passed. We had a great number of people who were applying for citizenship, and some of them traced to people back in Alabama and Georgia. It was made to apply to the people who had never come to the Indian Territory, but had taken their land in the old country, and was never intended to apply to people who had been here and had afterwards gone away. I had a good deal to do with the alien law, and think I dictated it.

And further the deponent saith not.

160 LEWIS MCGILBRA, a witness for the appellants, being by me first duly sworn, upon his oath says:

My name is Lewis McGilbra. I am a Creek Indian by blood. I live 4 miles west of Eufaula. I am about 37 years of age and am a full-blood Creek Indian.

I was a member of the committee of eighteen. The instructions given to that committee by the council were that the committee should call upon the town kings for the rolls of the members of their towns; then these rolls should be read before the committee slowly and distinctly, and if any citizen should object to any name as not being properly on the roll the committee must strike the name off.

A great number were scratched off. In my own town there was a big number scratched off. This committee had no authority to pass upon any citizenship, and consequently they merely followed the rules that were placed before them and put aside each and every person that any one objected to. We having no right to force the parties objecting to proof, we could not do any more than just scratch the names off the rolls they were on.

The committee made a list of those that they had scratched off and sent it to the council, but there was no disposition made of the list that they made of the parties who had been scratched off.

I was not a town king at the time, but was a member of the house of warriors from Hickory Ground town.

In my own town were a great many scratched off that I  
161 did not know very well, but there were three women who had been raised there and whom I knew to be citizens who were scratched off. The last session of council recognized these women and appropriated their money for the *per capita* payment that they missed by being scratched off the roll.

These women were full-bloods and were thrown off because they married Choctaws and went just across the Canadian river to live. The rolls before the committee were the regular authenticated rolls



of the towns. It is a standing law and custom for each of the 47 towns, through their kings, to make up their rolls of their own citizens, and then these rolls are presented to the council for approval.

I don't remember the names of all the persons objected to, but I do remember that Ellis Childers came in and objected to the Barbers, Poseys, Berryhills, and a whole lot of others, and they were all struck off the roll. At that time we had no right to decide as to these parties' rights to citizenship, but this was done to keep them from drawing their *per capita* money.

The committee did not mean exactly to deprive these parties of their rights, but according to our instructions we had to strike them off when any one objected to their names, and we understood that there was to be some other tribunal in which they could establish their rights to citizenship. Upon the report of this committee, the commission know- as the commission of five to try the rights of these parties struck — off the rolls.

I do not know anything of the actions of that commission

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And further the deponent saith not.

MOSES SMITH, a witness for the appellants, being first duly sworn, upon his oath says:

I am 30 years old. I am a farmer. I was a member of the committee of eighteen. I was a member of the house of warriors from Tulsa Canadian town.

The committee were instructed, as well as I can remember, to demand from each town king the rolls in his possession. This was done. We went along, and, according to our instructions, any man could come up and make objections to any name on the roll, and he was not required to present any proof. He just had to come up and say that this man is doubtful, and then the committee had to scratch him off and put him on another list. This was done.

We took up a town at a time, and if any objected we took the names off. By the rules that we were working under we had no authority to notify the persons objected to, or to pass upon any questions of citizenship. We made a report to the council showing the names of all parties stricken off, amounting to either 618 or 628, I do not remember which. We could do nothing but make the report, and we expected council to make a disposition of the names that we had stricken off.

When the committee was appointed John Goat was made chairman and served about a week, and then was elected a delegate to Ft. Gibson, and appointed me as chairman in his stead. While the committee was investigating the different rolls, quite a number of the citizens that had been stricken off the rolls came to me and wanted a hearing, wanting a chance to prove that they were citizens and had been wrongfully stricken off the rolls. I replied to them that the committee was not authorized to take any depositions or to pass upon any cases, that all that they could do was to strike or accept names, and they would have to look to the council for redress for anything that was done by the com-

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mittee. The council had passed an act authorizing the kings of the towns to make rolls of the citizens of their towns, and this had gone on for some time and they had made rolls which had been approved by the council. When the payment came on there was some question as to whether there were not too many on the rolls, and the committee was appointed to investigate the rolls. When the investigation began, one man would object to the names on the rolls of another king, and that king would object to names on the roll of the first king, and finally it got to be a fight between them.

The town kings had a right, under the act of council, to make a correct list of the members of their towns, and if it had not been for certain prejudice that existed among the members of the council that caused the creation of this committee there would not have been any names scratched off whatever.

I learned, from being in the position I was in, that this committee was organized to exercise—which they did—a great deal of prejudice work, which is sometimes practised by the politicians of the Creek nation.

164 As near as I can remember, this took place during the May session of the council in 1895.

If this committee had not been appointed there could not have been any scratching, because the kings had the authority to make up the rolls of their towns. They were the legal rolls.

These rolls made up by the kings which were submitted to the committee of eighteen were the last rolls that have been made up under the authority of the Creek nation, as far as I know.

I remember the names of James Barber, Mollie Stockton, George Eli Posey, George A. Posey, Morgan, Mary A. Wassom, Mrs. Coker, Ben Posey, and a great many others.

And further the deponent saith not.

JAMES M. BARBER, being first duly sworn, says:

My name is J. M. Barber; my age is 45 years; I live in the Creek nation,  $2\frac{1}{2}$  miles from Wagoner; my grandfather's name was Benjamin Posey; my grandmother's name was Eliza Berryhill; they were both half-breed Creek Indians. When I knew them first they lived in Texas, but they moved to this country years ago, about 1882.

My mother's name was Sarah E. Posey. My father was a white man; his name was Silas H. Barber. Tom Barber and John Barber are my full brothers. I am between the two. I am a full  
165 brother of the two. They are the John C. Barber and the Robert T. Barber whose names appears on page 178 of Perryman's Digest of the Creek Laws, approved Oct. 30, 1889.

Also on page 103 of McKellop's Digest of 1893. Mary Vance is my first cousin. Birdie Vance, Baby Vance, George Vance, and Joseph Vance are her children. They are mentioned in the same place in the Digest. W. M. Oswalt and M. W. Oswalt are my cousins. W. M. Oswalt's mother and my mother were full sisters. The other is his child.

I was born in Texas. My grandparents are dead. My grandfather died in the Creek nation, and is buried on Billy Brown's

place in the Creek nation, about 8 miles from Choska. The other appellants in the Jennie Johnson are all children, grandchildren and great-grandchildren of Benjamin Posey. Bill Posey was my full uncle. He was killed in the Creek nation by the authority of the Creek nation. He was known and recognized by every one in this country as a Creek citizen and was never disputed. I came to the Indian Territory, Creek nation, in 1872. I afterward left the Indian Territory and went back to Texas. I intended to come back. I have always all my life claimed this as my home. My people have always claimed this as our home and some of us have come back here every year. They came back and were recognized as citizens of the nation. I last came back here in September, 1890, and have resided here continuously ever since and have all my possessions here.

166 I have made right smart improvements in the Creek nation. I have farms, pastures, cattle, and hogs. I was called before Judge Childers, of Coweta district, Creek nation, by a notice, which is hereby presented and a copy filed herewith, marked Exhibit B. The light-horse man who served this on me told me that they wanted me to appear before the court and show why I was living here; that there was some dispute about it; that they wanted me to bring up all of my connections; we were living in a lawful pasture, and we were claimed to be non-citizens, and they wanted us to go there and to prove that we were citizens.

I notified my connection living around me—George W. Posey, known as George Eli Posey; Mollie Stockton, and my young half-brothers, Coker's wife, whom I represented (Mary S. Coker), and some other young ones. All of us appeared before the court on the day mentioned in the summons. Court set and called the trial. Joseph Mingo, being my town king, represented the case before the court. We satisfied the court that we were citizens. The judge told us to go home and attend to our own business; that we were all right. We held our *our* improvements, and have till today. The pastures that I was in was leased to John Gibson, and he refused to pay for the part I held. Afterwards the part I was on was cut out of the pasture, and my place was surveyed out of the

167 pasture. By the authority of the nation, the surveyor who was employed to survey the pastures was ordered to leave out the place of citizens in the large pastures, and my place was left out when the pastures were surveyed. Afterwards I began to fence the mile square north of my place for my pasture, and made a trade with the man who had the pasture leased by which he paid me for that mile square. Joseph Mingo has always claimed me as a member of his town and a citizen of the nation, and has always appeared and defended me when my rights were questioned. I have voted in the Creek nation ever since 1889, in the principal elections—that is, in the elections of the chief. I have voted in my town as a town member all the time till last year—the last election we have had; that was in the election called to consider the treaty with the Dawes commission. We all voted in that election. I have acted as a deputy light-horse—as militia man. I was called on by Judge

N. B. Childers to assist the light-horse, and did so serve. I have guarded prisoners and acted in that capacity until the court discharged me in the Chepon-Flannery case. I was requested by the judge to summon ten men. I summoned W. T. Morgan and other men some of my relations, Ben Posey and G. W. Posey.

I have held the position of assistant to the district attorney, Upter Bird, since January, 1897, under appointment from him, as shown by the attached authority filed herewith and marked Exhibit

168 C. A copy is filed *my* the special master.

Before I put in my place I went to see Chief Perryman and showed him my papers and told him who I was. He told me that he recognized me as a citizen, and that I was as much a citizen as he was, and that the law did not bar me from putting in the place; that I was all right, and that I should pick me out a place and go to work. This was all before I made the proof of citizenship before Judge N. B. Childers. I was struck off the rolls of the Creek nation by the committee of eighteen in 1895. I was never summoned to appear and was never given any opportunity to appear and make my proof before that commission. I afterwards made application to the commission of five and gave bond for the costs and staid there six weeks trying to get a trial. They would not give me a trial and adjourned without giving me a trial. I then went before the Dawes commission and made the application which is now here in this court on appeal.

#### EXHIBIT B TO TESTIMONY OF J. M. ROGERS.

COWETA DISTRICT, *June 6th*, 1893.

Mr. James Barber :



By order from the executive off. I do hereby require you to appear before me and establish your rights for living and claiming a right in the Muscogee nation.

169 Given under my hand the year and date above written.

N. B. CHILDERS,  
*Judge Coweta Dist., M. N.*

P. S.—Appear at the court-house on the 13th of June with your witnesses.

I hereby certify that the foregoing *os* a true copy of the original this day exhibited to me. This Jan. 12, 1898.

N. A. GIBSON,  
*Special Master.*

#### EXHIBIT C TO THE TESTIMONY OF J. M. BARBER.

COWETA DIST., M. N., *Jan'y 19th*, 1897.

To whom it may concern :

Know ye that I, Upter Bird, by power of authority vested in me by law of the M. N. as prosecuting attorney in and for the Coweta dist., do this day give Jim Barber authority to seize and confiscate

all peltry game of any kind, such as wild ducks, chickens, squirrels, quails, or any game of any kind that non-citizens may kill for speculation and sell to the highest bidder, and also chordwood or wood of any kind that a non-citizen may be handling for speculation.

Witness my hand the year and date above written.

UPTER BIRD,

*Pro. Att'y, Coweta Dist., M. N.*

170 I hereby certify that the foregoing is a true copy of the original this day exhibited to me. This Jan. 12, 1898.

N. A. GIBSON,

*Special Master.*

WARRIOR RENTIE, a witness for the appellants, being by me first duly sworn, upon his oath says:

My name is Warrior A. Rentie. I am 35 years old. I am a citizen of the Creek nation. I live about three miles northwest of the town of Muscogee. I was a member of the committee of eighteen which was appointed by the Creek council in 1895. I was a member of the house of warriors.

That committee did not summon any of the parties before it whose names were taken off the rolls and did not summon any witnesses that I remember of. The law provided that whenever there was an objection made by any citizen of the Creek nation against any one whose name might appear on the rolls that that person's name should be set aside. It did not matter whether he was known at all times to have been a citizen or not. That was about the way they got at it. There were no persons there to object except the committee. Some of the members of the council came into the committee meetings and had names scratched off the rolls. A good many of them did that. I

171 remember that some of the Barbers and Poseys were taken off. There were a number of these Poseys and Barbers scratched off the rolls. There seemed to be some trouble between the town kings and the members of the towns—one man would have some names scratched off the rolls of some town and then the member from that town as an act of retaliation would have names scratched off the rolls of the town of the first man. The committee used what were regarded as the authenticated rolls. These were the authenticated rolls up to that time. If this scratching had not taken place the rolls that were used would have been the rolls confirmed by the act of Congress of June 10, 1896.

I am a lawyer by profession. I was employed in the Creek court in a case in which there was a dispute between Walter Posey and Childers—had some trouble over some land—and he was charged with resisting the light-horse. That was in the Coweta district court. The Creek court took jurisdiction of that case and no question was made about jurisdiction or citizenship. He was taken up as any other citizen.

I think he was one that was struck — by the committee of 18. The committee struck off a great many names from the rolls.

And further deponent says not.

GABRIEL JAMISON, a witness for the appellants, being by me first duly sworn, says :

172 My name is Gabriel Jamison. My age is 56 years. I live in Coweta district, Creek nation. I am a citizen of the Creek nation. In 1895 I was town king of Arkansas town while the committee of 18 was in session.

I was a member of the house of kings at that time. I was present at some of the meetings of the committee. I went in to present the roll of Arkansas town. They struck off a great many of the names. They struck off Mary A. Wassom, W. T. Morgan, and a number of others. A good many of them have got back, and others have not. Josie Hawkins and his family were struck off at the same time. G. W. Miller, N. O. Perry, J. W. Weer, Hester Toon, J. M. Clark, J. W. & Isaac Walker, and W. J. Mount, and their families were all struck off.

The kings commenced fighting one another in the house, and would come up and say, "I don't believe that man has any right here," and they would scratch off the name and would not allow the town king to say anything to show who the people were. After they would not allow me to say anything to show who my people were, I grabbed my roll and told them that according to law I was the judge of the citizens of my town, and that I would take my roll and leave. Mr. Childers and Mr. Rentie, who were sitting there, told me not to leave, but to let them do what they pleased with the names, and so I let them have the roll. They went to work and struck off a good many families, and afterwards the council found that a good many people that they knew well were off, and they put them back, but those that they did not know never had a chance to get back.

173 I objected to a good many in Ellis Childers' Broken Arrow town whom I did not know at all, and he did the same for my town. Some of the Poseys and Barbers were struck off while I was before the committee, and some of them were kept on the roll. The committee was using the regular authentic rolls of the Creek nation. These were the same rolls, with the exception of the scratched names, that were in existence at the time the Dawes commission took charge in June, 1896.

And further deponent saith not.

The applicant here offers the judgment and record in the cases of the Barbers and Poseys in their application for citizenship before the judge of Coweta district of the Muscogee nation, said judgment bearing date June 13th, 1893.

LEWIS MCHENRY, a witness for the appellants, being first duly sworn, testified as follows:

I am a Creek citizen. I have held the office of clerk of the district court and permit inspector for Coweta district, and am now captain of the light-horse. Wesley Tiger was judge of the district court when I was clerk. The book exhibited to me is the record book of the district court used during the time I was clerk, and Wesley Tiger was judge, and this book was used for recording judgments of that court. I was clerk of the

174 court when the following cases were tried by Judge Tiger: Mary A. Wassom, J. E. Weer, Hester A. Toon, W. T. Morgan, G. W. Miller, N. O. Perry, W. J. Mount, Jacob Walker, Isaac Waler, Esther Clark, and J. M. Clark and their families. All of these parties were found to be Creek citizens, and Judge Tiger rendered a judgment to that effect. I, as clerk, entered up the judgment in these cases. Judgments were entered in this book offered as evidence as Exhibit "A" to the deposition of N. B. Childers. From examination I find that this book has been mutilated since leaving my hands by the cutting out of the first twenty-four pages. All the writing I did was in this book, and all of my writing was done in those twenty-four pages which have been cut from this book, and also all the judgments rendered by Judge Tiger were recorded in those pages which have been cut out.

And further deponent saith not.

TACKY GRAYSON, the next witness, after being duly sworn, was examined and testified as follows:

I am a citizen of the Creek nation. I have held the office of light-horse captain under Judge Tiger's administration, and am now a member of the council. I have been a member of the council for six years. I was present when the committee of eighteen struck off the names of the Wassoms and Morgans, Barbers and Poseys.

175 They never had any notice of that fact until a month or two afterwards, when I met Mr. Wassom and told him about it. I was present at the hearing of the cases of Morgan, Wassom, Weer, Toons, G. W. Miller, N. O. Perry, W. J. Mount, Jacob Walker, Isaac Walker, Esther Clark, and J. M. Clark cases. I was there when Mr. Mount came with a Creek witness who was named Thomas Norfer, who stated that Morgan and the Wassom families were Creeks by blood. The case was postponed until the judge got his clerk, and I interpreted for the judge and Mount's, and they put down all those names, and they were recognized as Creeks until struck off by the committee of eighteen. Nobody had anything to do with the rolls except the town king. The rolls of the town king were always recognized by the council as the rolls of the Creek nation.

And further deponent saith not.

N. O. PERRY, being duly sworn, testified as follows:

I was present at the trial — Gabriel Jameson, town king, and heard the trial of Gabreil Jameson before Judge Childers on the charge of

treason for enrolling these applicants mentioned above in the testimony of McHenry. Judge Wesley Tiger testified that he ordered Jameson, town king, to enroll the Wassoms and others mentioned in the testimony of Mr. McHenry.

And further deponent saith not.

Attest:

N. A. GIBSON,  
*Special Master.*

176 JUDGE'S OFFICE, COWETA DISTRICT, M. N., Jan. 15, 1898.

I, N. B. Childers, a judge of Coweta district, Muscogee nation, do this day certify that this — the record book for the Coweta district court used by Wesley Tiger in 1891, who was at that time judge for the Coweta district, Muscogee nation.

Witness my hand the day and year last above written and the seal of Coweta district, Muscogee *district*.

N. B. CHILDERS,  
*Judge, Coweta Dist.*

[SEAL.]  
COOIE CHILDERS,  
*Clerk, Coweta Dist.*

JUDGE'S OFFICE, COWETA DISTRICT, M. N., Jan. 15, 1898.

To my knowledge appeared, at the Coweta district court-house of Coweta, June 13th, 1893, at the investigation of the citizenship of Poseys and Barbers, held by N. B. Childers, then a judge of Coweta district, James Barber, M. S. Coker, G. W. Posey, Mollie F. Stokton, R. F. Barber, R. W. Barber, Hearty J. Barber, L. E. Barber.

I do this the day and year above written certify that the parties above mentioned are the parties that was tried in the Coweta  
177 district court for their citizenship by request of L. C. Perryman, then a principal chief of the Muscogee nation, by N. B. Childers, then also a judge of Coweta district.

[SEAL.] COOIE CHILDERS,  
*Clerk of Coweta District, M. N.*

"Copy."

*Mrs. Eliza Allen's Testimony.*

Wherein N. B. Childers, judge of Coweta dist., investigates the citizenship of the Barbers and Poseys.

What may be your name?

Ans. Mrs. Eliza Allen.

Where were you raised?

Ans. In Texas.

When did you come to the nation?

Ans. In 1883.

How old are you?

Ans. Forty-three years old.



Do you know Jim Barber?

Ans. Yes, sir.

Do you know how old he is?

— Well, I could not tell exactly, but I have known him ever since he was born.

Where was Jim Barber born at?

178 Ans. He was born in eastern Texas, Nacogdoches Co.

Who was Jim Barber's father?

Ans. Silas Barber.

Who was his mother?

Ans. Sarah Posey by birth, but Sarah Barber by marriage.

What degree of Indian blood have Jim Barber?

— His mother was a half-breed Creek Indian.

Was his mother related to you?

Ans. She was my sister.

Was Jim Barber's mother and you full sisters?

Ans. She was my full sister.

What was your mother's name?

Ans. Her name was Eliza Berryhill by birth.

Was Bill Posey any relation to you?

Ans. I am his sister.

Was Jim Barber's mother sister to Bill Posey?

Ans. Yes, sir.

The above statement sworn to before me this the 13 day of June, 1893.

[SEAL.]

N. B. CHILDERS,  
Judge, Coweta District.

COOIE CHILDERS, Clerk.

I do this the 15th day of Jan., 1898, certify that the above is a true and correct copy of the original record book of 1893, found — page 87.

COOIE CHILDERS,  
Clerk, Coweta Dist., M. N.

179

"Copy."

*Tom Barber's Testimony.*

Wherein N. B. Childers, judge of Coweta dist., investigates the citizenship of Barbers and Poseys.

Is Jim Barber your brother?

Ans. Yes, sir.

Is you and Jim Barber full brothers?

Ans. Yes, sir.

What relative is them boys to you?

Ans. Posey is my first cousin and Barber is my brother.

Above statements sworn to before me this the 13th day of June, 1893.

[SEAL.]

N. B. CHILDERS,  
*Judge, Coweta District, M. N.*

COOIE CHILDERS,  
*Clerk, Coweta Dist., M. N.*

I, Cooie Childers, clerk of the Coweta dist. court, do this the 15 day of Jan., 1898, do certify this is a true and correct copy of the statement of Tom Barber as was taken by me at day of trial, June 13th, 1893.

COOIE CHILDERS,  
*Clerk, Coweta Dist.*

180

*Copy of Decision.*

After questioning the witnesses in Barbers' and Posey case, I, N. B. Childers, judge of Coweta district, rule and so decide that the claimants heretofore mentioned were citizens of the Muscogee or Creek nation and entitled to enrollment.

Witness my hand this the 13th day of June, 1893, and the seal of Coweta dist.

[SEAL.]

N. B. CHILDERS,  
*Judge, Coweta Coweta Dist., M. N.*

COOIE CHILDERS,  
*Clerk of Coweta District.*

I, Cooie Childers, clerk of Coweta dist. court of Coweta, do this the 15th day of Jan., 1898, certify that this is a true and a correct copy of the decision of N. B. Childers, judge of Coweta dist., in the case of Barbers' and Poseys' citizenship.

COOIE CHILDERS,  
*Clerk of Coweta Dist., M. N.*

181

On the 27th day of September, A. D. 1898, there was filed in the office of the clerk of said court the petition for appeal in said cause, which is in words and figures as follows, to wit :

In the United States Court for the Northern District, Indian Territory.

JENNIE JOHNSON, CLARENCE JOHNSON, MARY F. JOHNSON, JENNIE B. Johnson, Walter A. Johnson, Benjamin A. Barber, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Sarah E. Barber, Edward H. Barber, Dora D. Barber, James M. Barber, Sarah E. Barber, Berdie E. Barber, John S. Barber, Martha S. Coker, *née* Niles Barber, Mary M. Barber, Martha S. Coker, *née* Barber; 182 Barber; Martha S. Coker, *née* Barber; Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker, Elva L. Coker, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, Fred Posey, George W. Posey, Katie Posey, Annie Posey, Claud Posey, Mollie F. Stockton, *née* Stinson; Ray M. Stockton, Harry T. Stockton, Grover C. Stockton, R. F. Barber, R. W. Barber, Hardy J. Barber, Jessie L. Barber, 183 L. E. Barber, and William Posey, Appellants,

*versus*

THE CREEK NATION, Appellees.

The above-named complainants, deeming themselves aggrieved by the decree made and entered in the above-entitled cause on the 16th day of June, 1898, hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CRAVENS & VON WEISE,  
*Solicitors for Complainants.*

Dated September 1st, 1898.

The foregoing claim of appeal is allowed.

WM. M. SPRINGER,  
*Judge of the United States Court,  
Northern District, Indian Territory.*

Dated September 27th, 1898.

(Endorsed as follows:) Filed September 27th, 1898. Jas. A. Winston, clerk.

184 On the 27th day of September, 1898, there was filed in the office of the clerk of said court bond to prosecute appeal in said cause, which is in words and figures as follows, to wit:

In the United States Court for the Northern District, Indian Territory.

JENNIE JOHNSON, CLARENCE JOHNSON, MARY F. JOHNSON, JENNIE B. Johnson, Walter A. Johnson, Benjamin A. Barber, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Sarah E. Barber, Edward H. Barber, Dora D. Barber, James M. Barber, Sarah E. Barber, Berdie E. Barber, John S. Barber, Pearl I. Barber, 185 Niles Barber, Mary M. Barber, Martha S. Coker, *née* Barber; Silas G. Coker, James M. Barber, Robert T. Barber, Eva Coker, Maud F. Coker, Elva L. Coker, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, Fred Posey, Geo. W. Posey, Katie Posey, Annie Posey, Claud Posey, Mollie F. Stockton, *née* Stinson; Ray M. Stockton, Harry T. Stockton, Grover C. Stockton, R. F. Barber, R. W. Barber, Hardy J. Barber, 186 Jessie I. Barber, L. E. Barber, and William Posey, Appellants,

*versus*

THE CREEK NATION, Appellees.

*Bond.*

Know all men by these presents that we, Frank M. Davis, J. M. Barber, T. M. Stockton, J. N. Fain, G. W. Posey, and M. L. Coker, are held and firmly bound unto the Creek Nation in the full and just sum of one thousand (\$1,000.00) dollars, to be paid to the said Creek Nation, its certain attorney, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dates this the 1st day of September, in the year of our Lord one thousand eight hundred and nin-ty-eight.

Whereas lately, at a United States court for the northern district of the Indian Territory, in a suit depending in said court between Jennie Johnson *et al.*, appellants, and The Creek Nation, appellees, judgment was rendered against the said appellants, and the said appellants having obtained and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and citation having issued to the said Creek Nation, citing and admonishing it to be and appear at a Supreme Court of the 187 United States, to be holden at Washington, on the first Monday of — next:

Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else in full force and virtue to remain.

FRANK M. DAVIS.

J. M. BARBER.

T. M. STOCKTON.

J. N. FAIN.

G. W. POSEY.

M. L. COKER.

Sealed and delivered in the presence of—

UNITED STATES OF AMERICA, }  
 Northern District, Indian Territory, } ss:

—, being sworn, deposes and says and each for himself says that he is worth — dollars over and above all his just debts, liabilities, and legal exemptions.

Sworn to this the — day of September, 1898.

Approved the within bond and the sureties thereon.

W. M. SPRINGER.

(Endorsed as follows:) Filed September 27th, 1898. Jas. A. Winston, clerk.

188 On the 27th day of September, 1898, there was filed in the office of the clerk of said court a bond for clerk's fees, which is in words and figures as follows, to wit:

In the United States Court for the Northern District, Indian Territory.

JENNIE JOHNSON, CLARENCE JOHNSON, MARY F. JOHNSON, JENNIE B. Johnson, Walter A. Johnson, Benjamin A. Barber, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Sarah E. Barber, Edward H. Barber, Dora D. Barber, James M. Barber, Sarah E. Barber, Berdie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber, Mary M. Barber, Martha S. Coker, *née* Barber; 189 Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker, Elva L. Coker, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, Fred Posey, George W. Posey, Katie Posey, Annie Posey, Claud Posey, Mollie F. Stockton, *née* Stinson; Ray M. Stockton, Harry T. Stockton, Grover C. Stockton, R. F. Barber, R. W. Barber, Hardy J. Barber, 190 Jessie L. Barber, L. E. Barber, and William Posey,

Appellants,

*versus*

THE CREEK NATION, Appellee.

*Bond for Clerk's Fees.*

Know all men by these presents that we, J. M. Barber, G. W. Posey, F. M. Stockton, & W. L. Koker, of Wagoner, in the Creek nation, Indian Territory, *Indian Territory*, are held and firmly bound unto J. H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said J. H. McKenney, his heirs, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, assigns, or administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 1st day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, — a United States court for the northern district of the Indian Territory, in a suit depending in said court between Jennie Johnson *et al.*, plaintiff, and The Creek Nation, defendants, a judgment was rendered against the said plaintiffs, and the said

191 plaintiffs having obtained an appeal in the said cause to the Supreme Court of the United States and filed a transcript of the record in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit :

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said J. H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said J. H. McKenney, clerk, as aforesaid, and charged to the said appellants in the prosecution of the said appeal, then the above obligation to be void ; otherwise to be in full force and virtue.

J. M. BARBER.

G. W. POSEY. [L. s.]

T. M. STOCKTON.

M. L. COKER. [L. s.]

Sealed and delivered in the presence of—  
— — —

I, James A. Winston, clerk of the United States court for the northern district of the Indian Territory, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

— — —, Clerk.

Approved :

W. M. SPRINGER, *Judge.*

(Endorsed as follows :) Filed September 27th, 1898. Jas. A. Winston, clerk.

192 On the 12th day of September, A. D. 1898, there was filed in the office of the clerk of said court the assignment of errors in said cause, which is in words and figures as follows, to wit:

In the United States Court for the Northern District, Indian Territory.

JENNIE JOHNSON, CLARENCE JOHNSON, MARY F. JOHNSON, JENNIE B. Johnson, Walter A. Johnson, Benjamin A. Barber, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Sarah E. Barber, Edward H. Barber, Dora D. Barber, James M. Barber, Sarah E. Barber, Berdie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber, Mary E. Barber, Martha S. Coker, *née* Barber; Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker, Elva L. Coker, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, Fred Posey, George W. Posey, Katie Posey, Annie Posey, Claud Posey, Mollie F. Stockton, *née* Stinson; Ray M. Stockton, Harry Stockton, Grover C. Stockton, R. F. Barber, F. W. Barber, Hardy J. Barber, Jessie L. Barber, L. E. Barber, and William Posey, Appellants,

*versus*

THE CREEK NATION, Appellees.

*Assignment of Errors.*

The appellants, by their attorneys, allege and say that in the record and proceedings in this cause there is manifest error in this:

1st. That by the record aforesaid it appears that the judgment aforesaid given was given for said appellee against these appellants, whereas by the law of the land it ought to have been given for the said appellants against the said appellee.

2nd. That the said judgment and decree was given against the evidence in the case.

3rd. And in this, that the said judgment and decree denies the right of these appellants to be enrolled as members of the Creek tribe of Indians, whereas the testimony shows that they are members of said tribe by blood and residents, and should have been enrolled as such by the judgment and decree aforesaid.

4th. In this, that the judgment and decree aforesaid is contrary to the facts found and reported by the master in chancery.

5th. In this, that the court erred in holding that the district courts of the Creek nation had no authority to hear and determine applications for citizenship in the Creek nation.

6th. In this, that the court erred in holding that the council of the Creek nation had supervisory jurisdiction of the district courts in reference to enrolling citizens.

7th. In this, in finding that these appellants should be excluded by the act of the Creek council of October 26th, 1889, it appearing from the testimony that all these appellants except James M. Barber and his children had come into and were residents of the Creek nation prior to the passage of said act, and that all these appellants, including James M. Barber and his children, had, before the passage of that act, applied for citizenship in the Creek nation, and they all come within the proviso contained in section 298, to wit: "This act



shall not apply to persons who have heretofore filed application for citizenship and where cases are now pending."

8th. In this, that the court held that the applicants for citizenship in the Creek nation might, under the act of the Creek council as referred to by the court on page 63 of Perryman's Compilation, prove their citizenship by a responsible, disinterested native witness  
196 before the district court, and yet that said courts could render no judgment or finding of citizenship upon said proof.

9th. That the court erred in disregarding the testimony of Judge N. B. Childres, one of the judges of the Creek nation, as to the laws and customs of the Creek nation authorizing the district courts thereof to pass upon matters of citizenship and the enrollment of the applicants.

10th. That there was an error in the court finding that roll from which the names of the appellants was stricken was a mere census roll, whereas it was a roll of Creek citizens made in accordance with the laws and customs of the Creek nation.

11th. There was an error of the court in finding that the action of the committee of eighteen, who were appointed to revise the rolls, was approved by the Creek council.

12th. There was an error of the court in finding that the roll of citizens made by the committee of eighteen was a final roll, it appearing from the testimony that said roll was made in an illegal way, and that many persons who were citizens by blood were stricken from said roll without any authority of law and as a matter of retaliation.

13th. There was error of the court in finding that it was incumbent upon appellants or any of them to appear before the citizenship commission of eighteen and secure the replacing of their  
197 names upon the roll, when it appears from the testimony that they had no notice of their names being stricken from the roll and no opportunity to be heard in any manner whatever.

14th. That there was an error in the court finding the one Ellis Childers, a witness for the appellants, was recently treasurer of the Creek nation, and owing to alleged official misconduct was deposed from that position, and is now under indictment at Vinita for issuing fraudulent Creek warrants, the same being found without the slightest shadow of testimony.

15th. That the court erred in finding that appellants or any of them had the question of their citizenship decided by the commission appointed by the act of May 30th, 1895, and were rejected by said commissioner, the proof showing that said commission never acted upon the case of these appellants at all.

16th. The court erred that these appellants were dropped from the Creek rolls by the council of said nation.

17th. There was error of the court in this, that it considered the record of the proceedings of the Creek citizenship commission, which was not submitted in evidence either by the appellants or the appellee.

18th. There was error of the court in finding that the Creek citi-

zenship commission denied the application of these appellants because it failed to admit them.

And the appellants pray that the judgment aforesaid be reversed, annulled, and altogether held for nothing, and that an order may be made directing appellants to be enrolled as members of the Creek tribe of Indians, and that they may be restored to all things which they have lost by occasion of the said erroneous judgment and decree.

CRAVENS & VON WEISE,  
*Attorney- for Appellants.*

(Endorsed as follows:) Filed Sept. 27th, 1898. Jas. A. Winston, clerk.

On the 27th day of September, 1898, there was filed in the office of the clerk of said court a citation on appellees in said cause, which is in words and figures as follows, to wit:

In the United States Court for the Northern District, Indian Territory.

JENNIE JOHNSON, CLARENCE JOHNSON, MARY F. JOHNSON, JENNIE B. Johnson, Walter A. Johnson, Benjamin A. Barber, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Sarah E. Barber, Edward H. Barber, Dora D. Barber, James M. Barber, Sarah E. Barber, Berdie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber, Mary M. Barber, Martha S. Coker, *née* Barber;  
Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker, Elva L. Coker, Benjamin B. Posey, Mary Lula Posey, Nina G. Posey, Fred Posey, George W. Posey, Katie Posey, Annie Posey, Claud Posey, Mollie F. Stockton, *née* Stinson; Ray M. Stockton, Harry Stockton, Grover C. Stockton, R. F. Barber, R. W. Barber, Hardy J. Barber,  
Jessie L. Barber, L. E. Barber, and William Posey, Appellants,

*versus*

THE CREEK NATION, Appellees.

United States of America to the Creek Nation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, (30) thirty days after the date of this citation, pursuant to an appeal filed in the clerk's office of the United States court for the northern district of the Indian Territory, wherein Jennie Johnson *et al.* are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said petition mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. M. Springer, judge of the United States court for the northern district of the Indian Territory, this

the 27th day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

W. M. SPRINGER, *Judge.*

Service of this citation accepted this 22d day of October, 1898.

BEN T. DU VAL,

*At'y for Creek Nation.*

(Endorsed as follows:) Filed September 27th, 1898. Jas. A. Winston, clerk.

UNITED STATES OF AMERICA, }  
202 *Indian Territory, Northern District,* } ss :

I, James A. Winston, clerk of the United States court for the northern district, Indian Territory, do hereby certify that the writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office, and constitute a true copy of the record and of the assignment of errors and of all proceedings in the case of Jennie Johnson and others against The Creek Nation.

Witness my hand and the seal of said court, at Muscogee, Indian Territory, on this the 21st day of October, A. D. 1898.

{ Seal United States Court in the Indian Territory, }  
Northern District, Muscogee.

JAS. A. WINSTON, *Clerk,*  
By N. S. YOUNG,  
*Deputy Clerk.*

Endorsed on cover: Case No. 17,046. Indian Territory U. S. court. Term No., 461. Jennie Johnson *et al.*, appellants, *vs.* The Creek Nation. Filed October 27th, 1898.



# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 496

THE CHICKASAW NATION, APPELLANT,

vs.

RICHARD C. WIGGS ET AL.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
TERRITORY.

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FILED OCTOBER 23, 1898.

(17,081.)

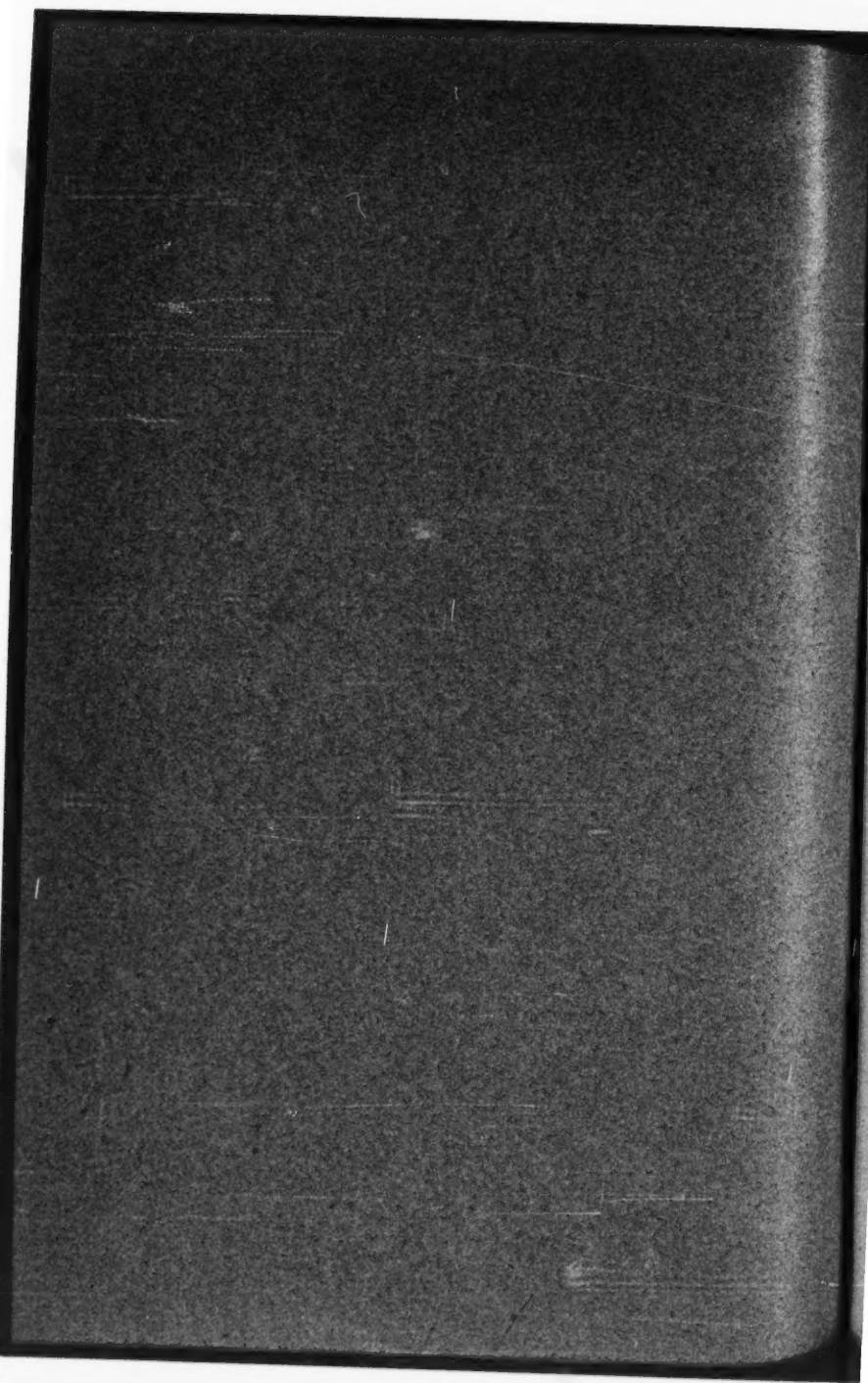
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(17,081.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 496.

THE CHICKASAW NATION, APPELLANT,

*vs.*

RICHARD C. WIGGS ET AL.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN  
TERRITORY.

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1-3 Be it remembered that at the stated term of the United States court in the Indian Territory, southern district, at Ardmore, begun and holden at Ardmore on the 5th day of October, 1896, and on the 40th day of said term, to wit, the 8th day of December, 1896—present and presiding, the Hon. Constantine B. Kilgore, judge—the following, among other, proceedings were had, to wit:

*In re cases of citizenship appeal.*

It is ordered by the court that the following rules be, and the same are hereby, adopted as rules of practice and procedure in appeals to this court from the decision of the tribal authorities or the United States commission to the five civilized tribes appointed to treat with said tribes, which are provided for by act of Congress, upon questions arising upon applications made by persons to be enrolled as citizens of the respective tribes of Indians.

The party desiring to appeal from the decision of any such tribunal or commission may within sixty days after notice of the rendition of the decision thereon file with the clerk of this court an application or petition, duly verified, setting out the style of such case; that the same has been decided adversely to the party filing the application for appeal, and praying that the said commission or tribunal be notified of said appeal and ordered to forward the papers to the clerk of this court, together with a duly certified transcript of all judgments and entries made and rendered by said tribunal or commission in said cause; whereupon the clerk shall issue a notice to said tribunal or commission, notifying that an appeal has been taken, and to immediately forward all papers in said cause, together with a duly certified copy of all judgments and entries made and entered by said tribunal to the clerk of this court.

The application for citizenship, amendments thereto, and answer thereto and amendments thereto shall constitute the pleadings of all of the parties in this court, and no pleadings shall be held invalid for want of form. In accordance with the practice before the commission, any party aggrieved may present and prosecute an appeal herein for the use and benefit of the entire family, including the wife, lineal descendants, and collateral kindred, to the United States court for the southern district of the Indian Territory. Where one or more of the applicants for citizenship reside in the southern district of the Indian Territory, the appeal shall be taken to the United States court for the southern district, and if all the applicants are non-residents of the Indian Territory, then said appeal shall be taken to the United States court held in the division in this Territory wherein the nation of the tribe to which said applicants claim to belong is situated. The clerk of the court shall file said papers and docket the case in a separate book to be kept for that purpose and known as the "citizenship docket," and the clerk shall also keep a separate record book in which shall be recorded the proceedings of this court in reference to citizenship cases, to be known as the "citizenship rec-

ord." The party desiring to appeal from any decision rendered by an Indian tribunal or the commission shall at the time he files his notice of appeal with the clerk of the United States court also lodge with said clerk evidence of the fact that notice of some kind has been served upon the opposite party or his attorney in the case that said application would be made. The notice need not be formal, but shall be required to be only so drawn as to inform the opposite party of the intention to appeal from said decision. After the expiration of the ten days after such service, waiver of appearance, or the filing of such papers with the clerk where notice of appeal is given before the commission, the case shall stand ready for trial, and the court shall be deemed open at all times for the purpose of hearing and determining such cases, and either party to said

5 action may introduce such other evidence as they may have in support of their cause of action or defense, regardless of whether the same was presented to the commission or not.

The court may, in its discretion or when agreed to by the parties, refer all papers in these cases to a special master, with instructions to take the testimony and report upon the law and facts presented in the record, pleadings, and service. Such reports shall be made at the earliest time practicable, not exceeding thirty days from the time each cause is referred to said master, and either party shall have ten days after the report of said master is filed to file exceptions thereto, both as to questions of law and fact, and after five days from the filing of the exceptions to said report the cause shall stand ready for trial before this court on the exceptions presented to the master's report and may be taken up and finally passed upon by the court.

The special master shall be allowed as compensation \$5 for each cause heard, provided not more than one day's time is devoted to said cause, and in case more than one day's time is consumed he shall have \$10 and no more as his compensation for hearing the same.

Should the United States commission or the tribunal created by the tribal authorities refuse to permit any party to a proceeding to establish citizenship and desiring to appeal from the decision of such tribunal or commission to withdraw the original papers for the purpose of filing the same in this court, such party may, upon petition to this court, setting forth the fact of such refusal, obtain an order of the court commanding such commission or tribunal, or the clerk or the secretary thereof, to surrender such papers and a transcript of the entries made therein, as heretofore provided.

Appeals in citizenship cases must be taken only at Aardmore, and, for the purpose of hearing and determining such cases,

6 the court at that place shall be deemed open at all times.

Any case, when submitted as required by these rules, may, in the discretion of the court, be transferred by the court, on the application of either party, to either Ryan, Chickasha, Purell, or Paul's Valley for hearing and determining when the court is in session at such places, but the decision of the court, when rendered,

and all papers in the case shall be filed with the clerk at Ardmore (Court Journal 9, page- 283, '4, '5).

7 Be it remembered that at a regular term of the United States court in the Indian Territory, southern district, at Ardmore, begun and holden on Monday, the 15th day of November, 1897, and on the 33rd day of said term, to wit, Wednesday, December 22nd, 1897—present and presiding, the Honorable Hosea Townsend, judge—the following, among other, proceedings were had, to wit:

RICHARD C. WIGGS ET AL.	} No. 27.
<i>vs.</i>	
CHICKASAW NATION.	

Comes now the applicants herein, by their attorney, and, after leave of the court first being had, file substituted application herein, together with one exhibit thereto, and also file substituted master's report and substituted supplemental master's report herein;

Which said substituted application is in words and figures as follows, to wit:

RICHARD C. WIGGS, for Benefit of Josie	} Application for Citizenship
Wiggs and Mary Edna Wiggs,	
<i>vs.</i>	
CHICKASAW NATION.	} Pending Before the Com- mission to the Five Civil- ized Tribes.

To the honorable commission:

Now comes your applicant, Richard C. Wiggs, and, with respect, alleges and shows that he is now and has been for about twenty-five (25) years a resident citizen of Pickens county, in the Chickasaw nation; that he is a white man and was prior to the 13th day of October, 1875, a citizen of the United States, though for  
8 some time he had resided in said Pickens county, Chickasaw nation; that on the 13th day of October, 1875, he lawfully intermarried with one Georgia M. Allen, who was a native Chickasaw Indian and a full member of the Chickasaw tribe and was so recognized by said tribe; that said marriage was contracted and celebrated according to the laws and usages of the said Chickasaw nation; that in 1876 the said Georgia M., the said wife of this applicant, died; that by reason of said marriage and the constitution, laws, and usages of the Chickasaw nation this applicant became a citizen of said Chickasaw nation and a member of said tribe of Indians; that he has ever since been a resident citizen of said Pickens county, Chickasaw nation, and has ever since been recognized by the authorities of said Chickasaw nation as a legal citizen of said nation and as a member of said tribe, enjoying all the rights and privileges as such, except he was disqualified to hold the office of governor by reason of the provisions of the constitution of said Chickasaw nation; that on the 11th day of April, 18—, this applicant lawfully intermarried with one Josie Lawson, a white woman and United States citizen; that said mar-

riage was performed and celebrated in said Chickasaw nation and in accordance with the laws thereof, the said nation receiving the fees provided by law therefor; that there has been born unto this applicant and the said Josie one girl child, named Mary Edna Wiggs, aged nine (9) years; that by the constitution and laws of the said Chickasaw nation any by reason of the general laws of the land the said Josie became by her marriage with this applicant a citizen of said Chickasaw nation and a member of said tribe of Indians, and their child, the said Mary Edna, is also a citizen of said Chickasaw nation and a member of said tribe of Indians, but your applicant shows that the authorities of said nation refuse to recognize the said Josie, wife of this applicant, and the said Mary Edna as citizens of said nation and as members of said tribe of Indians, and deny to them all their rights as such, and refuse to enter their names upon their roll of citizenship. Your applicant further shows that since he has been the husband of the said Josie he has been the duly elected and qualified sheriff of Pickens county, holding and exercising authority under the government of the said Chickasaw nation; that he has also been a member of the legislature of the said Chickasaw nation, and that his rights as a citizen have never been denied by the said Chickasaw nation, but only the rights of his wife and child, as above stated.

Wherefore he prays that upon the hearing of this application that your honorable commission will enter the names of said Josie Wiggs and the said Mary Edna Wiggs upon the roll of citizenship of said Chickasaw nation, conferring upon them all the rights and privileges incident thereto.

— — —  
*Attorneys for Applicant.*

I, Richard C. Wiggs, do on oath state that the matters and things set forth in the above application are true, and that my post-office address is Oakland, Indian Territory.

— — —

Indorsed: "No. 27. Richard C. Wiggs *et al.* vs. Chickasaw Nation. Substituted application for citizenship. Filed in open court Dec. 22nd, 1897. C. M. Campbell, clerk."

10 And thereafterward, on the same day, to wit, December 22nd, 1897, was filed with the clerk of said court the substituted application of Richard C. Wiggs for the benefit of himself in said cause; which said substituted application is in words and figures as follows, to wit:

RICHARD C. WIGGS <i>vs.</i> CHICKASAW NATION.	}	Application for Citizenship Pending Before the Commission to the Five Civilized Tribes.
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To the honorable commission:

Now comes your applicant, Richard C. Wiggs, and with respect alleges and shows that he is a citizen of Pickens county, Chickasaw

nation; that he is a white man, and that prior to the year 1875 he was a citizen of the United States, residing in the Chickasaw nation; that on the 13th of October, 1875, he was lawfully married to one Georgia M. Allen, who was a native Chickasaw Indian, in the Chickasaw nation and according to the laws thereof; that in 1876 the said Georgia M. died; that ever since the marriage of this applicant with the said Georgia M. Allen he has resided in the Chickasaw nation and has claimed and exercised all the rights of citizenship enjoyed by citizens of said nation, and his citizenship has never been denied or questioned by the said Chickasaw government, but has always been recognized and approved, and for this reason this applicant did not apply for citizenship for himself when he made his recent application in behalf of his present wife and daughter; but the delay on the part of the Chickasaw government to furnish a roll of citizenship to this honorable commission has excited apprehension in the mind of this applicant that said roll may not be furnished at all, or if furnished that his name may not appear upon it, and for that reason he now makes application for himself, and in support of the same he refers to the evidence  
 11 on file before this commission in support of the application made by this applicant in behalf of his present wife and daughter.

Wherefore he prays that this application be granted, and that he be enrolled as a citizen of said nation on the roll prepared by this honorable commission.

POTTER & POTTER,  
*Attorneys for Applicant.*

I, Richard C. Wiggs, do on oath state that the matters and things set forth in the above and foregoing application are true, and that my post-office address is Oakland, Indian Territory.

R. C. WIGGS.

Sworn to and subscribed before me this 26th day of Aug., 1896.

[SEAL.]

J. E. GRINSTED,  
*Notary Public, 3rd Div., Southern District.*

Indorsed: "No. 27. Before the commission to the five civilized tribes. Richard C. Wiggs vs. Chickasaw Nation. Substituted application for citizenship. Filed in open court Dec. 22nd, 1897. C. M. Campbell, clerk."

12 Before the honorable commission to the five civilized tribes.  
 In the Matter of the Application for Enrollment in the Chickasaw Nation of RICHARD C. WIGGS.

*Exception to Application Filed Before Dawes Commission.*

Now comes the Chickasaw Nation, by its attorneys, and respectfully shows to this honorable commission that the application herein is insufficient in law.

Wherefore it prays that said application be dismissed.

Second. For further special exception the Chickasaw Nation respectfully shows to this commission that the evidence produced by the applicant is insufficient to show any claim of citizenship in the Chickasaw tribe of Indians.

Wherefore it prays that said application be dismissed.

Third. For further special exceptions the Chickasaw Nation shows that said application is insufficient, in that it shows that said applicant has not complied with the laws of said nation and therefore is not entitled to any of the rights, privileges, and immunities as such citizen.

Wherefore it prays that said application be dismissed.

THE CHICKASAW NATION,

*By Its Attorneys.*

13

RICHARD C. WIGGS ET AL. }

*vs.*

CHICKASAW NATION. }

No. 27.

Comes now W. B. Johnson herein, attorney for the Chickasaw Nation, and, after leave of court first being had, files its two substituted answers herein.

Which said answers are as follows, to wit:

Before the honorable commission to the five civilized tribes.

In the Matter of the Application of R. C. Wiggs *et al.* for Enrollment in the Chickasaw Nation.

Comes now the Chickasaw Nation, by its attorneys, and, without waiving any exception heretofore taken to the application filed herein, and without consenting to, but denying, the jurisdiction of this honorable commission to pass upon a question of citizenship in the Chickasaw tribe of Indians, presents this its answer to said application and respectfully represents:

First. The Chickasaw Nation admits that the applicant, R. C. Wiggs, married to Georgia M. Allen, who was a native Chickasaw Indian, but the Chickasaw Nation shows that such marriage was not according to the laws of the Chickasaw nation, and for that reason did not confer any rights of citizenship upon the said R. C. Wiggs.

Second. The Chickasaw Nation also shows that the marriage of the said R. C. Wiggs to his present wife was not solemnized according to the laws of the Chickasaw nation; that the present wife of the said Richard Wiggs is a white woman and citizen of the

14 United States, and that she acquired no right of citizenship by reason of the marriage with the said applicant, nor could the said Richard C. Wiggs confer any right of citizenship on his daughter, Mary Edna Wiggs.

Wherefore the Chickasaw Nation prays that said application be rejected.

THE CHICKASAW NATION,

*By its Attorneys.*



Indorsed: "No. 27. Richard C. Wiggs *et al. vs.* Chickasaw Nation. Substituted answer. Filed in open court Dec. 22nd, 1897. C. M. Campbell, clerk."

15 And thereafterwards, to wit, on the 4 day of Feb'y, 1897, was filed in the office of the clerk of the United States court, southern district of Indian Territory, at Ardmore, the following judgment from the Dawes commission:

DEPARTMENT OF THE INTERIOR,  
COMMISSION TO THE FIVE CIVILIZED TRIBES,  
VINITA, INDIAN TERRITORY, — —, 1896.

RICHARD C. WIGGS ET AL.	}	170. Application of Richard C. Wiggs Granted as an Intermarried Citizen.
<i>vs.</i> CHICKASAW NATION.		

Appealed.  
Sustained.

I, H. M. Jacoway, Jr., secretary, do hereby certify that the above and foregoing is a true and correct copy of Chickasaw Record —, page —, of the commission to the five civilized tribes.

Given under my hand and official signature this — day of —, 1897.

H. M. JACOWAY, JR., *Secretary*,  
By HENRY STROUP.

The above and foregoing judgment is indorsed in words and figures as follows, to wit: Richard C. Wiggs *et al. vs.* Chickasaw Nation. Filed Feb. 4th, 1897. Jos. W. Phillips, clerk.

16 In the United States Court for the Southern District of the Indian Territory, at Ardmore.

RICHARD C. WIGGS ET AL., Plaintiff,	}	Petition for Appeal to the U. S. Dist. Court for the Southern Dist., Ind. Ter.
<i>vs.</i> CHICKASAW NATION, Defendant.		

To the Honorable C. B. Kilgore, judge:

Comes now the Chickasaw Nation, feeling itself aggrieved by the decision of the Dawes commission in the above cause admitting certain applicants therein to citizenship, — hereby prays an appeal from said decision to this honorable court.

W. B. JOHNSON,  
*Attorney for Chickasaw Nation.*

The foregoing appeal is allowed this 2nd day of Jan'y, 1897.

C. B. KILGORE, *Judge.*

17 In the United States Court for the Southern District of the Indian Territory, at Ardmore.

RICHARD C. WIGGS ET AL., Plaintiff, }  
 vs. } Petition for Appeal to the  
 CHICKASAW NATION, Defendant. } U. S. Dist. Court for the  
 Southern Dist., Ind. Ter.

To the Honorable C. B. Kilgore, judge:

Comes now the applicants here, feeling themselves aggrieved by the decision of the Dawes commission in the above cause rejecting certain applicants, — hereby prays an appeal from said decision to this honorable court.

POTTER & POTTER,  
*Attorneys for Applicants.*

The foregoing appeal is allowed this 2nd day of Jan'y, 1897.

C. B. KILGORE, *Judge.*

18 In the United States Court in the Indian Territory, Southern District, at Ardmore.

RICHARD C. WIGGS ET AL. }  
 vs. } Notice of Appeal.  
 CHICKASAW NATION. }

To the Hon. Henry L. Dawes, chairman of the commission of the United States to the five civilized tribes of Indians.

SIR: You are hereby notified that an appeal has been granted in the matter of the application of Richard C. Wiggs *et al.* to be enrolled as members of the Chickasaw tribe of Indians from your commission to the United States court for the southern district, in the Indian Territory, at Ardmore. You are therefore notified and ordered to immediately forward to the clerk of this court all of the original papers filed, used, and considered in said cause by your commission, together with a duly certified copy of all orders, judgments, and entries made and entered by you in the trial and consideration of said cause.

Witness the Hon. C. B. Kilgore, judge of said court, and the seal thereof, at Ardmore, Indian Territory, this 2nd day of Jan'y, 1897.

[SEAL.]

JOS. W. PHILLIP-, *Clerk.*

19 And thereafterwards, to wit, on Friday, Jan'y 21st, 1898, present and presiding aforesaid, the following further proceedings in said cause were had, to wit:

RICHARD C. WIGGS ET AL., Plaintiff, }  
 vs. } No. 27. Plea to Jurisdiction.  
 CHICKASAW NATION, Defendant. }

Comes now the defendant, The Chickasaw Nation, and respectfully avers that this court has no jurisdiction to hear this cause, for the reason that the act creating the Dawes commission and the right

of this court to pass upon causes appealed to it from said commission, determining the question of citizenship in the Chickasaw nation, is unconstitutional and void; that said act gives this defendant no right to cross-examine the witnesses of the applicant, and the same is contrary to the treaty of 1866, entered into by the United States Government and the Chickasaw nation, by which said Chickasaw nation reserved the right to pass upon all matters concerning said tribe and all civil and political rights of the individual members thereof; that said treaty is still in full force and effect and was at the time of the act of Congress creating the commission to the five civilized tribes and authorizing this court to pass upon appeals from the same was enacted.

## II.

Because said act deprives the Chickasaw nation and the individual members thereof of property without due process of law.

## III.

Because said act is class legislation, in that the same deprives either party of an appeal, as in other cases, to the higher courts of the Territory and of the United States.

## IV.

Because the jurisdiction extended to this court has been limited to controversies between citizens of different tribes or between citizens or members of the tribe of Indians and a United States citizen, and expressly reserving to the Indians controversies arising between themselves.

## V.

Because if this court determines that the applicant is a member of said nation, it is then passing upon rights between citizens of the same tribe of Indians, and no judgment thereon can be entered for want of jurisdiction in this court.

Wherefore the defendant prays that said cause be dismissed for the above reasons, and that it go hence without day, etc.

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*Attorney for Chickasaw Nation.*

The above and foregoing is indorsed in words and figures as follows, to wit: "Richard C. Wiggs *et al.*, plaintiff, vs. Chickasaw Nation, defendant. Plea to jurisdiction. Filed in open court *nunc pro tunc* Dec. 20, 1897. C. M. Campbell, clerk."

20	RICHARD C. WIGGS, for the Benefit of Mary Edna Wiggs and Georgia Ann Wiggs, <div style="text-align: center;">vs.</div> CHICKASAW NATION.	}	Report of the Master in Chancery.
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To the Honorable C. B. Kilgore, judge of said court:

In this case there is no controversy over the facts, which are as follows:

Richard C. Wiggs, a white man and citizen of the United States, on the 13th day of October, 1875, married Miss Georgia M. Allen, a member of the Chickasaw tribe of Indians by blood, in accordance with the laws of the Chickasaw nation governing the intermarriage of one of their members to a non-citizen. Mrs. Georgia Wiggs died on the — day of —, 1876. The applicant has been and now is a resident of the Chickasaw nation ever since his marriage with Georgia M. Allen. On the 11th day of April, 1886, Richard C. Wiggs was duly married to Miss Josie Lawson, a citizen of the United States, in accordance with the laws of the Chickasaw nation. There was born to them one child, the applicant, Mary Edna Wiggs; that ever since the first marriage Richard C. Wiggs has been recognized as a citizen of the Chickasaw nation. Richard C. Wiggs on the 30th day of August, 1896, filed an application before the commission for the United States to the five civilized tribes of Indians for the benefit of Josie and Mary Edna Wiggs, praying that their names be enrolled as members of the Chickasaw tribe of Indians. The application was denied on the — day of —, 1897, and this appeal was duly taken on the — day of —, 1897. On the 30th day of October, 1896, the Chickasaw Nation, through its attorney, filed an answer before said commission and admitted the material facts above stated. The answer further sets up that by reason of the second marriage Richard C. Wiggs has forfeited his membership of the Chickasaw tribe and prays that he be denied enrollment.

I wish to note here that Richard C. Wiggs is not before this court, and it has no jurisdiction in this case to pass upon his citizenship. The application was not filed for his benefit, but for the benefit of his wife and minor daughter. How defective this answer is, I shall proceed to examine the application upon its merits.

#### *Conclusions of Law.*

Are Mrs. Josie Wiggs and her daughter, Mary Edna Wiggs, entitled to enrollment? It would be fruitless to enquire into the relations that existed between the United States and the Chickasaw and Choctaw Indians before the 38th article of the treaty of 1866 was adopted. Sufficeth it to say that at the time of the Dancing Rabbit treaty between the United States and the Chickasaw and Choctaw Indians in 1830 the Chickasaws and Choctaws were the owners and in possession of large and valuable land interests in the States of Alabama and Mississippi; that by the terms of said treaty they

exchanged their lands in those States for the lands now owned and occupied by them in the Indian Territory. I make this observation to call the attention of the court to the fact that the Indian has received no bounty of the United States. So far as I have been able to ascertain, the Chickasaw and Choctaw races of Indians from time immemorial have been the sole judges of the membership of their tribes. Congress at no time has ever exercised any jurisdiction over this subject, except by the 38th article of the treaty of 1866. In 1855, in a constitutional provision, the legislature of the Chickasaw nation was given jurisdiction to adopt white people to membership of their tribe. By another provision, adopted at the same time, a non-citizen who intermarried with a Chickasaw was made a member of the tribe. Further evidence of this jurisdiction is found in section 7 of the Chickasaw constitution, adopted in 1867: "All persons other than Chickasaws who have become citizens of this nation by marriage or adoption and have been confirmed in all their rights as such by former conventions and all such persons as aforesaid who have become citizens by adoption, by legislature or by intermarriage," etc. It will be noticed that not only was this jurisdiction recognized under the constitution of 1855, but also prior to that date; so it is safe to say that the case at bar must be tried by the Chickasaw standard of membership, except so far as it is affected by the treaty — 1866. In 1876 the Chickasaw legislature passed the following act relating to citizenship:

"Sec. 3. Be it further enacted That no marriage heretofore solemnized or which may hereafter be solemnized between a citizen of the United States and a member of the Chickasaw nation shall enable such citizen of the United States to confer any right or privilege whatever in this nation by again marrying a citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation and shall have heretofore abandoned her or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all rights acquired by such marriage in such nation, and shall be liable to removal as an intruder upon the limits thereof."

This statute, unless in conflict with higher law, is valid and must be adhered to by this court. It is insisted that the act is not only in violation of the treaty of 1866, article 38, but also of section 7 of the constitution of 1867. If in conflict with either, it is void, or if, as insisted, the constitution of the Chickasaw nation is one of delegated powers, and there is no power granted to the legislature which enacted such a statute, then it would be void. We will examine the last objection further. It is doubtless true that the Chickasaw government is one of delegated power in one sense of that term. It exists within the territorial limits of the United States and obtained all its powers as a government by treaties with the United States; but this is not the contention. It is insisted that by a constitutional enactment of its own the Chickasaw government created itself one of delegated power, a proposition involving an

absurdity upon its face. The courts in the United States  
 23 recognize two primary rules of construction. One applies to  
 acts of Congress, the other to acts of State legislature. The  
 General Government being one of delegated powers, before an act  
 of Congress can be considered valid there must be an express grant or  
 power or one of necessary implications; so, before an act of Congress  
 can be considered constitutional, authority for its enactment must be  
 found in the Constitution. A different rule obtains in regard to  
 the acts of the State legislature. The enquiry then is, Is the act in  
 violation of the State constitution? and not whether it is authorized  
 by it. We find the following in the Chickasaw constitution of  
 1867:

"SEC. 19. All rights and powers not herein granted or expressed  
 are reserved to the people, and any law that may be passed contrary  
 to the provisions of the constitution shall be null and void."

If the Chickasaws *have* had intended to create the restrictions  
 upon its legislative body, as insisted upon, we are at a loss to see  
 why this provision was incorporated, "and the law that may be  
 passed contrary to a provision of this constitution shall be null and  
 void." This demonstrates that the rule governing the acts of State  
 legislatures was intended to be adopted, and if any other intention  
 had have existed there would have been a qualifying clause declar-  
 ing all of the acts of the legislature void that were not passed in  
 conformity to some provision authorizing the same. We might  
 add that it is doubtful whether this court can adjudge an act of the  
 Chickasaw legislature void, there being no Federal question in-  
 volved. I therefore find that the statute of 1876 is not void for want  
 of authority in the Chickasaw legislature.

The next question is, Is the statute of 1876 in violation of either  
 article 38 of the treaty of 1866 or of the seventh section of the con-  
 stitution of 1867? The article is as follows:

"Any white person having married a Choctaw or Chickasaw re-  
 sides in the said Choctaw or Chickasaw nations, or who has been  
 adopted by the legislative authorities is to be deemed a member of  
 said nation, and shall be subject to the laws of the Choctaw and

24 Chickasaw nations, according to his domicile, and to prosecu-  
 tion and trial before their tribunals and to punishment accord-  
 ing to their laws, as though he were a native Choctaw or  
 Chickasaw." The seventh section of the constitution of 1867 is:

"All persons other than Chickasaws who have become citizens of  
 this nation by marriage or adoption, and have been confirmed  
 in all their rights as such by a former convention and all such  
 persons as aforesaid who have become citizens by adoption by the  
 legislature or by intermarriage with the Chickasaws since the adop-  
 tion of the constitution of August 18, 1856, shall be entitled to all  
 the rights, privileges and immunities of a native-born citizen, and  
 all who may hereafter become a citizen either by marriage or adop-  
 tion shall be entitled to all the privileges of a native-born citizen  
 without being eligible to holding the office of governor."

What do we understand by the words Choctaw and Chickasaw in  
 this treaty? In another form, does the term Chickasaw and Choc-



taw mean members of the tribe or do they mean Choctaw and Chickasaw Indians by blood? It is to be borne in mind that there are three classes of members of the Chickasaw tribe—members by blood, members by adoption, and members by intermarriage. It is true that in law members by marriage or adoption are Chickasaw Indians—that is, they are entitled to enjoy all the rights, privileges, and immunities of a Chickasaw Indian by blood. This is secured to them both by the treaty and the constitution. The terms Choctaw and Chickasaw are equivalent to Choctaw and Chickasaw Indians. Choctaw and Chickasaw are tribal terms that designate the particular tribe of Indians to which they belong. If it is true that the terms Choctaw and Chickasaw as used in the treaty and constitution are equivalent to the term Choctaw and Chickasaw Indians, the solution is clearly in an opinion of the Supreme Court of the United States written by C. J. Taney in 1884, in the case of *The United States vs. Rogers*. The defendant Rogers killed one Nichols in the Chickasaw nation and was indicted by the circuit court of

the United States for the district of Arkansas in 1845. The  
25 indictment alleged that both Rogers and the deceased were citizens of the United States and not members of any Indian tribe. The defendant pleaded to the jurisdiction of the court and alleged in his plea that both himself and deceased were intermarried citizens of the Cherokee nation, and that by the laws of that nation they were citizens and members of that tribe. There was a demurrer to the plea, and the opinion is upon it. The opinion is based upon the conclusion that the laws of the Cherokee nation was as stated in the plea. The following paragraph in the opinion is significant and pertinent to the question under consideration:

“By the 25th section of that act the prisoner, if found guilty, is doubtless liable to punishment unless he comes within the meaning of the exception contained in the proviso, which is that the provisions of that section shall not extend to the crimes committed by one Indian against the person or property of another Indian. We think it very clear that a white man who at mature age is adopted by and Indian does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe and make himself amenable to their laws and usages, yet he is not an Indian; yet the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of a member of the tribe, but of a race generally or of a family of Indians, and it is intended to govern them, both as regards their own tribe or other tribes also to be governed by Indian usages and customs.”

In 1867, when the Chickasaws incorporated article 38 of the treaty of 1866 into their constitution, they evidently so understood these terms. Sec. 7 of the constitution begins: “All persons other than Chickasaws who have become citizens of this nation by marriage or adoption,” etc. Here they clearly recognize the true meaning of the term Chickasaw as used in the treaty. It is therefore conclusive that by use of the term Chickasaw in



the treaty it was intended to mean a Chickasaw Indian by blood as contradistinguished to those members of the tribe who obtained their membership by adoption or intermarriage. It will be conceded by all that if the above conclusions are correct Mrs. Josie Wiggs and daughter cannot be admitted to enrollment through any right of their own emanating from the treaty of 1866 or the constitution of 1867, for the reason that they do not come within the terms of those instruments. If they are entitled to enrollment, it must be held by this court that the statute of 1876 was an invasion of the rights of the husband and father as secured by the treaty and constitution. The next inquiry, therefore, will be, Was the statute inimical to the rights of the intermarried husband and father? The fact that the second spouse and children of the intermarried citizen were not provided for in the treaty or constitution is significant, and it would appear but natural, had it been the intention of the framers or writer of these instruments to grant membership to this class of people, both one or the other of them would have thrown around them the safeguards that were given to the intermarried and adopted members, and could have their rights left to be determined upon the husbands' or wives' real or fancied power to confer such membership by marriage. Although I am convinced that these observations would be fatal to the alleged power to confer citizenship, but in the absence of the statute of 1876 the wife and child would be entitled to enrollment, but upon a different reason they will be noticed later on in this report. The reasoning upon the power to confer citizenship is that it is a valuable right to confer citizenship upon the spouse; that a Chickasaw by blood has the power to confer membership upon a non-citizen by marriage; that the treaty and constitution guarantees to intermarried members all of the rights of a Chickasaw by blood; that the statute of 1876 attempts to destroy the power of the intermarried citizen alone to confer citizenship by marriage, and is therefore void. The vice in this reasoning is apparent only upon close inspection. Nowhere in the treaty or constitution can be found the terms "confer citizenship," and we think that the other terms are highly misleading and arise from a radically erroneous view of the constitution and treaty. There is no such power given by one or the other of these instruments to either intermarried or adopted citizens of full-blood Chickasaw Indians. The correct view, in my humble judgment, is that the moment a Chickasaw Indian not a member of the Chickasaw tribe of Indians marries a non-citizen, that moment a non-citizen becomes a member of the tribe, and his or her citizenship is protected by the treaty and constitution. The membership is not conferred by the marriage directly, but is conferred directly by the treaty and constitution, and is not a right, power, or privilege, or immunity of the Indian citizen who marries. If the membership was conferred by marriage, then citizenship would become a subject-matter of contract. So far as I am aware, no government upon earth regards citizenship in such a light. It is wholly a creature of law and within the domain of law. These

reasons lead me to the conclusion that there is — nor cannot exist under the treaties, laws, and constitution of the Chickasaw nation as we now find them the right, vested in any member of the Chickasaw nation, by blood or otherwise—the right to confer citizenship by blood. It is the act of the law and not a right of a citizen. I am therefore of the opinion that in so far as this case is concerned the statute of 1876 is not in conflict with either the 38th article of the treaty of 1866 or section seven of the constitution of 1867, and it must furnish the rule for decision.

But it is *argued*, by way of argument, that in the event this rule is to be adopted the citizenship of the wife and children will be anomalous. There appears to be an erroneous view upon this subject prevalent among the members of the bar. When Richard C. Wiggs intermarried with Georgia M. Allen he was a citizen of the United States. Did he after this marriage cease to be such a citizen? Congress passed an act some years ago providing how a member of an Indian tribe who was not a citizen of the United States could become one. It also provided that any one availing himself of the opportunity of the act should lose no

28 Indian right as a member of his tribe. The attention of the court is hereby called to this act to show that Congress did not consider dual citizenship inconsistent. The familiar doctrine that when an individual becomes a citizen of a government, that relation remains unchanged until termination in one of three ways: by death, by forfeiture for crime, or by expatriation. Expatriate is defined to be to leave one's country, renouncing allegiance to it for the purpose of making a home and becoming a citizen of another country—Anderson's Dictionary. By this standard Richard C. Wiggs is still a citizen of the United States, so far as the facts in this case show. It may be true that by treaty the United States has surrendered jurisdiction in the Indian Territory of his person and property, yet his allegiance to the United States is unchanged, and his wife and child are also citizens of the United States. I wish to remark in this case that before the passage of — 1876 the wife would have become a member of the tribe. It was observed in Roff's case that the very passage of the statute of 1876 is conclusive evidence of what the law was before the passage of that act. It has been urged in argument that the class of applicants to which Mrs. Wiggs and daughter belong should be enrolled, because it is the policy of the United States to absorb the Indian race by miscegenation. Such seems to have been its policy, it is true, but to admit to enrollment this vast class of applicants would defeat the very object of such a policy. It would require but a few years more under such a scheme to make the real Indian a mere faction in his own government, and his lands would be allotted among aliens to his race when that prospective day arrives.

Indorsed: "No. 27. Richard C. Wiggs *et al.* vs. Chickasaw Nation. Report of master. Filed in open court Dec. 22nd, 1897. C. M. Campbell, clerk."

29 RICHARD C. WIGGS ET AL. }  
 vs. } Report of the Master in Chancery.  
 CHICKASAW NATION.

Now comes the master in chancery and begs to make the following supplemental report in the above case:

When I made my report in this case before I did not think the rights of Richard C. Wiggs were involved, but I afterwards learned that a proceeding had been filed in behalf of Wiggs, and by consent of the attorneys they were both to be considered together. Under the facts found in my original report and for reasons therein stated, I recommend that Richard C. Wiggs be admitted to citizenship in the Chickasaw nation.

W. H. L. CAMPBELL,  
*Master in Chancery.*

Indorsed: "No. 27. Richard C. Wiggs *et al.* vs. Chickasaw Nation. Substituted supplemental report of the master. Filed in open court Dec. 22nd, 1897. C. M. Campbell, clerk."

I, C. C. Potter, one of the attorneys for the applicant, do on oath state that the above and foregoing papers are substantial copies of the original papers in said cause.

C. C. POTTER.

Sworn — and subscribed before me this 24th day of December, 1897.

[SEAL.]

C. B. POTTER,  
*Notary Public in and for Cooke County, Texas.*

It is hereby agreed that the above and foregoing papers may be substituted for the original papers in the above cause, which were destroyed in the fire that burned the court-house at Ardmore. It is also agreed that the case was properly appealed from the Dawes commission by both the applicants and the Chickasaw Nation.

POTTER & POTTER,  
*Attorneys for Applicants.*  
 W. B. JOHNSON,  
*Att'y for Chickasaw Nation.*

30 Indorsed: "No. 27. Richard C. Wiggs *et al.* vs. Chickasaw Nation. Substituted papers. Filed in open court Dec. 22nd, 1897. C. M. Campbell, clerk."

31 Be it remembered that at a regular term of the United States court in the Indian Territory, southern district, at Ardmore, begun and holden on Monday, the 15th day of November, 1897, and on the 32nd day of said term, to wit, Tuesday, December 21st, 1897—present and presiding, the Hon. Hosea Townsend, judge—the following, among other, proceedings were had, to wit:

*Order.*

*In re* order of court allowing substitution of papers in citizenship cases.

The papers in a majority of the citizenship cases pending in this court having been burned and destroyed by fire on the morning of the 16th inst., it is ordered that the applicants in each and all of the said cases have until the 10th day of January, A. D. 1898, to substitute all their papers in the various cases, and that W. B. Johnson, attorney for the Chickasaw nation, have until February 1st, 1898, to substitute the papers of said nation (vol. A, Citizenship Record, pages 128 and 129).

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*Opinion by the Court.*

In the Southern District, Indian Territory.

TOWNSEND, J.

*In re* Indian Citizenship Cases.

COURT :

I have examined with some care the treaties between the United States Government and the Choctaws and Chickasaws, in order that I might become familiar with all the negotiations. The first treaties were made in 1786, separately with each tribe or nation, as they were called. Not, however, until 1820 was the subject mentioned of taking any land west of the Mississippi river. On October the 18th, 1820, near Doak's stand, on the Natchez road, a treaty was entered into between the Choctaws and the Government of the United States, in which it was stated in the preamble the purpose was "to promote the civilization of the Choctaw Indians by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging for a small part of their land here a country beyond the Mississippi river, where all who live by hunting and will not work may be collected and settled together." Whereupon, in part consideration of the ceding of a part of their reservation then existing, the Government ceded "a tract of country west of the Mississippi river, situate between the Arkansas and Red rivers," and by its boundaries being substantially the country now embraced in the Choctaw and Chickasaw nations. In 1825 another treaty was entered into between the Choctaw nation and the Government, by which the Choctaws ceded to the Government all the land ceded to them in 1820, "lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south to Red river;" in consideration for which the Government undertook to remove certain settlers, citizens of the United States, from the west to the east side of said line, and to pay certain money consideration for a series of years, and

33

certain other provisions not material for consideration in this connection.

On September 27th, 1830, another treaty was entered into between the Choctaws and the Government, in the preamble to which it is recited that "the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws. Now, therefore, that the Choctaws may live under their own laws in peace with the United States and the State of Mississippi, they have determined to sell their lands east of the Mississippi."

It is provided that in consideration that the United States "shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," they "cede to the United States the entire country they own and possess east of the Mississippi river, and they agree to remove beyond the Mississippi river."

Under the 14th article it is provided that each head of a family who desires to remain shall have a reservation, and then states that "persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

On the 22nd day of June, 1855, a treaty was entered into between the Choctaws, Chickasaws, and the Government, and this was the first treaty at which all three were represented. Its purpose was declared to be "a readjustment of their relations to each other and to the United States," and for a relinquishment by the Choctaws of

34 "all claim to any territory west of one hundredth degree of west longitude." In the first article of said treaty it is provided that "pursuant to act of Congress approved May 28th, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common."

On the 28th of April, 1866, another treaty was entered into between the Choctaws, Chickasaws, and the United States. This treaty seems to have been necessitated by the changed condition of affairs that resulted from the war of the rebellion and attempts to arrange civil government for the Choctaws and Chickasaws and an allotment of their lands in severalty. It provides for the survey and platting of the lands, and that, when completed, the maps, plats, etc., shall be returned to a land office that was to be established at Boggy Depot for the inspection by all parties interested, and that a notice shall be given for a period of ninety days of such return by the legislative authorities of said nations or, upon their failure, by the register of the land office; and in article 13 it is provided that the notice shall be given, not only in the Choctaw and Chickasaw nations, "but by publication in newspapers printed in the States of Mississippi and Tennessee, Louisiana, Texas, Arkansas, and Alabama, to the end that such Choctaws and Chickasaws

as yet remain outside of the Choctaw and Chickasaw nations may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws: Provided, that before any such absent Choctaw or Chickasaw shall be permitted to select for him or herself or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become *bona fide* residents in the said nation within five years from the time of the selection; and should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled and the land thereafter shall be discharged from all claims on account thereof."

This is the last treaty entered into between the Choctaws and the Chickasaws and the United States, but as late as December 24th, 1889, the council of the Choctaw nation passed a resolution calling upon Congress to defray the expense of moving the Choctaws in Mississippi and Louisiana to the Choctaw nation.

It was not until 1832 that the Chickasaws took any steps by treaty to move west. On October 20th, 1832, a treaty was entered into between the Chickasaws and the United States. In the preamble it is set forth that, "being ignorant of the language and the laws of the white man, they cannot understand or obey them. Rather than submit to this great evil, they prefer to seek a home in the west, where they may live and be governed by their own laws."

In the first article of said treaty it is provided that "the Chickasaw nation do hereby cede to the United States all the land which they own on the east side of the Mississippi river, including all the country where they at present live and occupy."

It is provided by said treaty that their lands shall be surveyed and sold and the proceeds held for their benefit, and they would hunt for a country west of the Mississippi river, and in the 4th article it is provided: "But should they fail to procure such a country to remove to and settle on, previous to the first public sale of their country here, then, and in that event, they are to select out of the surveys a comfortable settlement for every family in the Chickasaw nation, to include their present improvements;" and in the supplementary articles entered into October 22nd, 1832, it is provided "that whenever the nation shall determine to move from their present country, that every tract of land so reserved in the nation shall be given up and sold for the benefit of the nation."

On May 24, 1834, another treaty was entered into between the Chickasaws and the United States, making some different provisions about the sale of their lands, but no change in the general purpose.

On January 17, 1837, a convention and agreement was entered into between the Chickasaws and the Choctaws, subject to the approval of the President of the United States, by the terms of which the Chickasaws agree to pay the Choctaws the sum of \$530,000.00 for the territory that they now occupy. Excepting a treaty between



the Chickasaws and the United States, adopted June 22nd, 1852, in regard to the disposition of their lands east of the Mississippi river, we are brought down in the history of the treaties of the Chickasaws to the treaty of 1855, heretofore mentioned, between the Choctaws, Chickasaws, and the United States.

In all these various treaties, solemnly entered into, there is not one line or word to indicate that the Choctaws and Chickasaws who did not remove to the western country were not Choctaw or Chickasaw citizens and members of their respective tribes; on the other hand, in the treaty of 1830, between the Choctaws and the United States, it is expressly provided that those who remained should "not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

When it was supposed that the lands would be allotted in severalty under the treaty of 1866 it was expressly provided that notice should be published in the papers of several States that absent Choctaws and Chickasaws might come in and obtain the benefits of the allotment, and absentees were to be allowed five years to occupy and commence improvements, and all that was necessary was to satisfy

the register of the land office that that was their intention.  
37 The allotment did not take place, but if they had not come in they were only to lose their allotment of land; it did not make them any the less Choctaws or Chickasaws or members of the Choctaw and Chickasaw tribes.

It has been said that they could not be put upon the roll as citizens and members of those tribes unless they lived upon the land within the Choctaw or Chickasaw nation. I submit that the action of the Choctaw and Chickasaw nations themselves, when making the treaty of 1866, don't bear out that view, and if they were Choctaws and Chickasaws in 1866, what has occurred to change their relations to those tribes? I have heard of nothing whatever.

It is said that the land was held in common, and certainly some of the tenants in common in possession could hold the possession for all their cotenants in common. The bulk of the nation living in the Territory ceded and maintaining the tribal government or nation certainly met every requirement of residence and was a compliance in all respects with the treaty stipulations of living on the land.

I shall hold that non-resident Choctaws and Chickasaws who have properly filed their application and established their membership of the tribes shall be admitted to the roll as citizens.

Who is an intermarried citizen and who is an adopted citizen of the Choctaw and Chickasaw nations?

Article 38 of the treaty of 1866 is as follows:

"Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nations, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects, as though he was a native Choctaw or Chickasaw."



Does this article apply to future marriages and adoptions  
 38 or only those prior to its adoption? By article 26 of said  
 treaty it is provided in regard to the rights to take land in  
 severalty as follows:

Article 26.

"The right herein given to Choctaws and Chickasaws respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such."

Under section 7 of the general provisions of the Chickasaw constitution, adopted August 16th, 1867, both as originally adopted and as amended, said sections can have but one construction, and that, that they regarded the said 38th article as binding on their future action, and if this is so, it would not be within the power of either the Choctaw or Chickasaw nations to pass or adopt any constitution or law in violation of said article, or that would take away the rights, privileges, or immunities that has attached to any white person under and by virtue of its provisions.

Under the constitution of the Chickasaws above referred to, section 10 of the general provisions gives the legislature power to admit or adopt as citizens of said nations "such persons as may be acceptable to the people at large."

This authority had been exercised frequently by the legislature of both nations, as I am informed, prior to the adoption of said treaty as well as subsequent to its adoption.

On October 19th, 1876, the legislature of the Chickasaws passed an act in relation to marriage between citizens of the United States and a member of the Chickasaw tribe or nation of Indians. The second section, among other things, provides: "Hereafter no marriage between a citizen of the United States and a member of the

Chickasaw nation shall confer any right of citizenship, or  
 39 any right to improve or select lands within the Chickasaw nation, unless such marriage shall have been solemnized in accordance with the laws of the Chickasaw nation."

This act was amended September 24th, 1887, in some particulars, but the above-quoted provision was retained.

Amongst all civilized nations it is conceded to be a right that each nation, and in the United States that each State, can exercise and determine by their laws the requirements to be observed in solemnizing marriages; but marriage among civilized nations does not confer citizenship. Under the Choctaw and Chickasaw law it does; besides, it is supposed to carry with it certain property rights. The general rule among civilized nations is that a marriage good where solemnized is good everywhere; but in some States, where marriage is prohibited between certain races of people, they have not been recognized, though they were lawful where solemnized. I think it is within the power of the Choctaw and Chickasaw nations to say by legislation that before a white person shall become one of their citizens, with all the privileges of one, they shall be married according to the forms and requirements of their laws, and tha

such legislation is not in violation of the 38th article of the treaty of 1866; but when a white person has married a Choctaw or Chickasaw according to their laws and resides in the Choctaw or Chickasaw nations, he is in all respects "as though he was a native Choctaw or Chickasaw," and his rights under the treaty attaches, and it is not within the power of the Choctaw or Chickasaw nation to take the same away by legislation or otherwise. It has been said that when adoption takes place by an act of their legislature, the same power that granted can take away. I doubt this proposition, if by the adoption treaty rights have attached, and I am firmly of the opinion that property rights that have attached under the treaty cannot be taken away, and that only political rights could thus be abrogated.

40 Along the lines herein indicated the citizenship cases pending in this court will be disposed of.

HOSEA TOWNSEND, *Judge*.

41 Be it remembered that at a regular term of the United States court in the Indian Territory, southern district, at Ardmore, begun and holden on Monday, the 15th day of November, 1897, and on the 33rd day of said term, to wit, Wednesday, December 22nd, 1897—present and presiding, the Honorable Hosea Townsend, judge—the following, among other, proceedings were had, to wit:

42 In the United States Court in the Indian Territory, Southern District, at Ardmore.

RICHARD C. WIGGS ET AL.	} Judgment.
vs.	
CHICKASAW NATION.	

Now this cause came on to be heard upon the report of the master in chancery herein, as well as upon the entire record, with all the evidence therein contained; and the court, being fully advised in the premises, is of opinion that the said master's report should be corrected in so far as it attempts to exclude any of the applicants herein to citizenship in the Chickasaw nation; and, as thus corrected, the court is of opinion that the said master's report should be in all things confirmed, and it is so ordered.

The court finds that all of the applicants are entitled to be enrolled as Chickasaw Indians, it appearing to the court that the said Richard C. Wiggs, being a white man and citizen of the United States, was married in the year 1875 to Georgia M. Allen, who was a native Chickasaw Indian by blood. Said marriage was solemnized according to the laws of the Chickasaw nation; that in the year 1876 the said wife of the said Richard C. Wiggs died; that from and after said marriage the said Richard C. Wiggs continued to reside in the Chickasaw nation and to claim the rights of citizenship in said nation, and as such he served in the Chickasaw legislature, and was also sheriff of Pickens county, in said nation; that in the year 1886 the said Richard C. Wiggs was lawfully married,

according to the laws of the Chickasaw nation, to Miss Josie Lawson, and that ever since said marriage the said Wiggs and his present wife have resided in the Chickasaw nation and claimed the rights of citizenship therein, and that there has been — unto them a daughter, Mary Edna Wiggs.

It is therefore considered, ordered, and decreed that the said Richard C. Wiggs and his wife, the said Josie Wiggs, and  
43 their daughter, the said Mary Edna Wiggs, be, and they are hereby, admitted to citizenship in the Chickasaw nation and to enrollment as members of the tribe of Chickasaw Indians, with all the rights and privileges appertaining to such relation; and it is further ordered that this decree be certified to the Dawes commission for their observance. It is further ordered that the plaintiff do have and recover of the said Chickasaw nation all costs in this behalf expended; to all of which the defendant excepts.

44 And thereafterwards, to wit, on Wednesday, December 22nd, 1897, present and presiding aforesaid, the following further proceedings in said cause were had, to wit:

RICHARD C. WIGGS ET AL., Plaintiff,	} No. 27. Motion for a New Trial.
vs. CHICKASAW NATION, Defendant.	

Now comes the defendant, Chickasaw Nation, and respectfully moves the court to set aside the judgment heretofore rendered in this cause for the following reasons, to wit:

First. Because the judgment was contrary to law.

Second. Because the same was contrary to the evidence.

Wherefore it prays that said judgment be set aside and held for naught.

#### CHICKASAW NATION.

The above and foregoing is indorsed in words and figures as follows, to wit: "R. C. Wiggs *et al.* vs. Chickasaw Nation. Motion for a new trial. Filed in open court Dec. 22, 1897. C. M. Campbell, clerk."

45 And thereafterwards, to wit, on Monday, March 7th, 1898, present and presiding aforesaid, the following further proceedings in said cause were had, to wit:

R. C. WIGGS ET AL., Plaintiff,	} No. 27. Order Overruling Plea to the Jurisdiction and Motion for a New Trial.
vs. CHICKASAW NATION, Defendant.	

On this 7th day of March, 1898, came on to be heard the defendant's plea to the jurisdiction of the court herein and its motion for a new trial, and the court, after hearing said plea and motion, is of the opinion that the same should be and is in all things overruled and denied; to which judgment of the court the defendant duly excepted.

46 And at the April, 1898, term of said court, to wit, on the 11th day of July, 1898, present and presiding the Hon. Hosea Townsend, judge, the following, among other, proceedings were had, to wit:

RICHARD C. WIGGS ET AL. }  
*vs.* } No. 27. Order of Substitution.  
 CHICKASAW NATION. }

It appearing to the court by the affidavit of William B. Johnson, attorney for the Chickasaw Nation, that some of the papers in the hereinafter-styled cause were destroyed by fire, and that the same were not substituted prior to the judgment rendered in this court, it is ordered that the said record be supplied, in order that the record of appeal may be in all things complete.

(Signed) HOSEA TOWNSEND, *Judge.*

(Court Journal, vol. 11, pp. 114, 115, and 116.)

RICHARD C. WIGGS ET AL. }  
*vs.* } No. — Application for Appeal.  
 CHICKASAW NATION. }

Thereupon the said defendant in said cause, the said Chickasaw Nation, deeming itself aggrieved by the said decree made and entered of record on the 22 day of Dec., 1897, appeals from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) W. B. JOHNSON,  
*Solicitor for Defendant.*

This 11th day of July, 1898.

47 And thereafterwards, on the 50th day of said term, to wit, on the 11th day of July, 1898, was filed with the clerk of this court the assignment of errors in this cause; which assignment of errors is in words and figures as follows, to wit:

In the United States Court for the Southern District of the Indian Territory, at Ardmore.

RICHARD C. WIGGS ET AL., Plaintiff, }  
*vs.* } Assignment of Errors.  
 CHICKASAW NATION, Defendant. }

The defendant in this action, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon the trial of this cause, to wit:

First. The court erred in holding that the act of Congress creating the commission to pass upon citizenship of applicants in the Chicka-

saw nation and their right to appeal to said court was constitutional.

Second. The court erred in overruling the plea to the jurisdiction of the Dawes commission and said court to pass upon the citizenship of the applicants herein.

Third. The court erred in holding that the laws, customs, and usages of the Chickasaw nation did not control and govern the admission of the applicants to citizenship.

Fourth. The court erred in holding that the Chickasaw nation did not have a right to pass a law relative to citizenship in the Chickasaw nation when said law in any way modified or changed a treaty of said Chickasaw nation with the United States.

Fifth. The court erred in holding that the applicant herein, who had failed to comply with the laws of the Chickasaw nation regulating his citizenship therein, was still entitled to all the  
48 rights and immunities of a citizen and entitled to be enrolled as such.

Sixth. The court erred in holding that it was unnecessary for the applicant, in order to retain his citizenship in the Chickasaw nation, which he had acquired by the laws of said nation by marriage into the said tribe, to further comply with the laws of said nation by not again marrying any United States citizen.

Seventh. The court erred in holding that a United States citizen could marry a Chickasaw citizen by blood, according to their laws, and become a citizen thereof, and after the death of said Chickasaw Indian that the said United States citizen could marry another United States citizen, according to the laws of the Chickasaw nation, and thereby confer the right of citizenship in the said Chickasaw nation upon the second spouse and the issue thereof, and so on to all succeeding issues.

Eighth. The court erred in holding that the United States citizen acquiring citizenship in the Chickasaw nation did not forfeit his right to citizenship by again marrying a United States citizen.

Ninth. The court erred in holding that a United States citizen who had married a Chickasaw Indian and acquired citizenship in said nation by reason of said marriage did not forfeit the same when he had been divorced from his Indian wife.

Tenth. The court erred in holding that any United States citizen divorced from an Indian wife had the right to confer citizenship in the said Chickasaw nation upon the second wife, who was a United States citizen, and the issue thereof.

Eleventh. The court erred in holding that where a United States citizen had married an Indian citizen according to the laws of the Chickasaw nation, and the Indian citizen died, the United States citizen could confer the right of citizenship in the Chickasaw nation on the issue of the second marriage with a United States citizen not  
in accordance with the laws of the Chickasaw nation.

49 Twelfth. The court erred in holding that when a United States citizen whose Chickasaw Indian wife had either died or been divorced from him, and he had then married a United States citizen, that the issue of said second marriage, by marrying

according to the Chickasaw laws, could confer citizenship upon the spouse and children of said issue.

Thirteenth. The court erred in that, after the papers in this cause were destroyed, an order was made that such papers be substituted within a certain date during the term of court in which said order was made.

Fourteenth. The court erred in overruling defendant's exceptions to the report of the master in chancery.

Fifteenth. The court erred in granting this divorce upon the substituted pleadings and evidence of the plaintiff alone, the pleadings and evidence of both plaintiff and defendant having been destroyed.

Sixteenth. The court erred in granting a decree upon the report of the master in chancery alone.

Seventeenth. The court erred in overruling a motion of the defendant for a new trial.

Eighteenth. The court erred in referring this cause to a master in chancery.

Nineteenth. The court erred in granting a decree for the plaintiff herein.

W. B. JOHNSON,  
*Att'y for Chickasaw Nation.*

Indorsed: "No. 27. Richard C. Wiggs *et al.* vs. Chickasaw Nation. Assignment of errors. Filed in open court July 11th, 1898. C. M. Campbell, clerk."

50 And thereafterwards, to wit, on the 11th day of July, 1898, there was filed in the clerk's office of the United States court, southern district, at Ardmore, the following appeal bond; which bond is in words and figures as follows, to wit:

RICHARD C. WIGGS ET AL., Plaintiff,	} No. 27. Bond on Appeal.
<i>vs.</i>	
CHICKASAW NATION, Defendant.	

Know all men by these presents that we, The Chickasaw Nation, as principal, and R. M. Harris, gov., and Richard McLish and Walter Colbert, as sureties, are held and firmly bound unto the plaintiff, Richard C. Wiggs *et al.*, in the full and just sum of 100 dollars, to be paid to the said plaintiff, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a court of the United States for the southern district of the Indian Territory, in a suit pending in said court between Richard C. Wiggs *et al.*, plaintiff, and The Chickasaw Nation, defendant, a decree was rendered against the said Chickasaw Nation, and the said Chickasaw Nation having obtained an appeal and filed



a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Richard C. Wiggs *et al.*, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, in the month of October next:

Now, the condition of the above obligation is such that if the said Chickasaw Nation shall prosecute said appeal to effect and answer all damages and costs if *he* fail to make this said plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

CHICKASAW NATION.  
R. M. HARRIS, *Gov.*  
RICHARD McLISH.  
WALTER COLBERT.

Sealed and delivered in the presence of—

FRED C. CARR.  
PHIL BARRETT.

Approved by—

HOSEA TOWNSEND,

*Judge of the United States Court for the Southern  
District of the Indian Territory.*

The above and foregoing bond is indorsed in words and figures as follows, to wit: "Richard C. Wiggs *et al.* vs. Chickasaw Nation. Defendant's bond. Filed in open court July 11th, 1898. C. M. Campbell, clerk."

51 The foregoing claim of appeal is allowed and bond for costs fixed at \$100.

(Signed)

HOSEA TOWNSEND, *Judge.*

This 11th day of July, 1898.

(Court Journal, vol. 11, pp. 114, 115, and 116.)

RICHARD C. WIGGS ET AL. }  
vs. } No. 27. Order.  
CHICKASAW NATION.

Thereupon, upon motion of William B. Johnson, attorney for the Chickasaw Nation, it is ordered that the defendant have ninety days in which to prepare and file its bill of exceptions.

(Signed)

HOSEA TOWNSEND, *Judge.*

(Court Journal, vol. 11, pp. 114, 115, and 116.)

RICHARD C. WIGGS ET AL. }  
vs. } No. 27. Order Granting Extension  
CHICKASAW NATION. } of Time for Return Day.

Thereupon comes William B. Johnson and moves the court that the return day of the citation in this cause be extended sixty days, and it appearing to the court that, owing to the great number of



cases to be appealed by the Chickasaw Nation, it would be impossible to immediately perfect the appeal by said nation in all of said cases, it is ordered that the return day of said citation be extended sixty days.

(Signed)

HOSEA TOWNSEND, Judge.

(Court Journal, vol. 11, pp. 114, 115, and 116.)

52 THE UNITED STATES OF AMERICA, ss :

To Richard C. Wiggs *et al.*, Greeting :

Whereas the Chickasaw Nation has lately appealed to the Supreme Court of the United States from a decree lately rendered in the United States court for the southern district of the Indian Territory, made in favor of you, the said Richard C. Wiggs *et al.*, and has filed the security required by law :

You are therefore cited to appear before the said Supreme Court, at the city of Washington, on the first day of the fall term next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Ardmore, in the southern district of the Indian Territory, this 11th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

HOSEA TOWNSEND,

Judge of the United States Court for the Southern District  
of the Indian Territory.

Original.

I hereby, this 21st day of July, 1898, accept due personal service of this citation on behalf of Richard C. Wiggs *et al.*, appellees.

POTTER & POTTER,

Solicitors for Appellees.

[Endorsed :] # 27. Richard C. Wiggs *et al.* v. Chickasaw Nation. Citation. Original. Filed in open court Jul- 11, 1898. C. M. Campbell, clerk.

53 And thereafterwards, on the 11th day of July, 1898, was filed with the clerk of the United States court for the southern district of the Indian Territory the following affidavit for substitution of papers, to wit :

RICHARD C. WIGGS ET AL., Plaintiff,	} Affidavit for Substitution of Papers.
vs.	
CHICKASAW NATION, Defendant.	

Comes now William B. Johnson, attorney for the Chickasaw Nation, who, being duly sworn, upon oath deposes and says :

That in the above numbered and styled cause a great many of the papers were destroyed by fire and have not been substituted, and that said record is incomplete, and the appeal cannot be perfected without the same are supplied.

WM. B. JOHNSON.

Subscribed and sworn to before me this 9th day of July, 1898.

[SEAL.]

PHIL BARRETT,

Notary Public.

The above and foregoing affidavit is endorsed in words and figures as follows, to wit: "No. ——— vs. Chickasaw Nation. Affidavit for substitution of papers. Filed in open court July 11th, 1898. C. M. Campbell, clerk."

54 And thereafterward, to wit, on the 29 day of Sept., 1898, was filed with the clerk of this court the bill of exceptions in said cause; which said bill of exceptions is in words and figures as follows, to wit:

In the United States Court for the Southern District of the Indian Territory, at Ardmore.

RICHARD C. WIGGS ET AL., Plaintiffs,	} Bill of Exceptions.
vs.	
CHICKASAW NATION, Defendant.	

Be it remembered that on the 15 day of Aug., 1896, Richard C. Wiggs *et al.* filed with the Dawes commission, at Vinita, Indian Territory, their application for citizenship in the Chickasaw nation.

That thereafter, to wit, on the 1 day of Sept., 1896, the Chickasaw Nation filed with the said Dawes commission its answer to the application of the said Richard C. Wiggs *et al.*, in which the said Chickasaw Nation, after objecting to and denying the jurisdiction of the said Dawes commission to pass upon a question of citizenship in the Chickasaw tribe of Indians, did answer in detail the allegations of the applicants.

That thereafter, to wit, on the 15 day of Nov., 1896, said Dawes commission admitted the applicant, Richard C. Wiggs, to citizenship in the Chickasaw nation, but denied the same to his second wife and to the issues of said second marriage; to which admission of the said Richard C. Wiggs the Chickasaw Nation then and there excepted.

That thereafter, to wit, on the 15 day of Dec., 1896, plaintiffs did appeal from the decision of the said Dawes commission, and defendant did cross-appeal from the same, said appeals being each duly perfected.

55 Be it further remembered that on the 8 day of Dec., 1896, an order was made referring this cause to a master in chancery; to which order of the court the defendant objected, and said objection being overruled, the defendant then and there duly excepted and still excepts.

And thereafter, to wit, on the 21 day of May, 1897, said cause having been referred, as aforesaid, to a master in chancery, which was heard before said master in the town of Ardmore, and after hearing the same the said master found the said Richard C. Wiggs to be a citizen of the Chickasaw nation, but rejected the second wife of the said Richard C. Wiggs and the issue of the said second mar-

riage; to which report admitting the said Richard C. Wiggs the defendant then and there duly excepted.

Said exceptions to the master's report are in words and figures as follows, to wit:

In the United States Court for the Southern District of the Indian Territory, at Ardmore.

RICHARD C. WIGGS ET AL., Plaintiffs,	}	Exceptions to Master's Report.
CHICKASAW NATION, Defendant.		

Comes now the Chickasaw Nation, by its attorney, and respectfully excepts to the report made by the master in said cause, because,

First. Same is not supported by the evidence.

Second. The decision is not in conformity with the law in force governing such cases in the Chickasaw nation, Indian Territory.

Wherefore it prays that said report be disapproved and the applicants rejected.

W. B. JOHNSON,  
*Attorney for Chickasaw Nation.*

That thereafter, to wit, on the 22 day of Dec., 1897, when said exceptions came on to be heard by the court, the same were overruled; to which the defendant objected, and said objection being overruled, the defendant then and there excepted and still excepts.

Be it further remembered that on the 20 day of Dec., 1897, the defendant filed its plea to the jurisdiction of the Dawes commission and of this court to pass upon appeals from the said Dawes commission for reasons stated in said plea; which plea being by the court overruled, the defendant objected, and said objection being overruled, the defendant then and there excepted and still excepts.

56 Be it further remembered that on the 22 day of Dec., 1897, the above cause came on to be heard before the Honorable Hosea Townsend, judge of the above court; whereupon came the plaintiffs and the defendant, by its attorney, and the following, among other, proceedings were had, to wit:

Plaintiffs introduced the following testimony:

57 INDIAN TERRITORY, }  
Chickasaw Nation. }

Personally appeared before me, the undersigned authority, I. O. Lewis, who deposes as follows:

I am a citizen of the Chickasaw nation and a member of said tribe of Indians, and at present hold the office of attorney general of said Chickasaw government; that I have known Richard C. Wiggs for about eighteen (18) or twenty (20) years; that I do not know, of my own knowledge, that the said Richard C. Wiggs was ever married to Georgia M. Allen, but I do know, by general repute in the neighborhood, that he was so married. I further state that during the

time that I have known the said Richard C. Wiggs he has been recognized by the Chickasaw government as a lawful citizen of the said Chickasaw nation, and as such has held the office of sheriff of Pickens county, in said nation, and in fact has enjoyed all the rights and privileges of a citizen of that nation. I further state that I know that the said Richard C. Wiggs, in about 18—, was lawfully married to Josie Lawson, and that they have ever since lived in Pickens county, in the Chickasaw nation, as husband and wife; that their marriage was consummated under and in accordance with the laws of the Chickasaw nation. I further state that the said Richard C. Wiggs and his present wife, Josie, have one child, Mary Edna Wiggs, aged about nine (9) or 10 years. I further state that I am in no way related to either of the above parties and have no interest in the result of the application of the said Wiggs for his said wife and child.

Sworn to and subscribed this — day of —, 1896.

58 Plaintiffs here closed their testimony and rested their case; whereupon the defendant, in addition to its answer in this cause before the Dawes commission, did introduce the following exceptions; which exceptions were heretofore introduced before the said commission, and being by said commission overruled, the defendant excepted.

59 Before the Honorable Commission to the Five Civilized Tribes.

In the Matter of the Application for Enrollment in the Chickasaw Nation of RICHARD C. WIGGS.

Now comes the Chickasaw Nation, by its attorneys, and respectfully shows to this honorable commission that the application herein is insufficient in law.

Wherefore it prays that said application be dismissed.

Second. For further special exception, the Chickasaw Nation respectfully shows to this commission that the evidence produced by the applicant is insufficient to show any claim of citizenship in the Chickasaw tribe of Indians.

Wherefore it prays that said application be dismissed.

Third. For further special exceptions the Chickasaw Nation shows that said application is insufficient, in that it shows that said applicant has not complied with the laws of said nation, and therefore is not entitled to any of the rights, privileges, and immunities as such citizen.

Wherefore it prays that said application be dismissed.

THE CHICKASAW NATION,

*By its Attorneys.*

Said exceptions were overruled by the court; to which judgment of the court the defendant then and there excepted and still excepts

60 This being all the testimony introduced upon the trial of the cause by either plaintiffs or defendant, the court rendered its decision in favor of the plaintiffs; to all of which decree and the rendition thereof the defendant then and there, in open court, duly excepted and still excepts.

Be it further remembered that on the 22 day of Dec., 1897, the defendant presented to the court its motion for a new trial for reasons set forth in said motion; which motion was on March 7, 1898, by the court overruled, and to which judgment of the court in overruling said motion the defendant then and there duly excepted and still excepts.

And now comes the defendant on this 29 day of Sept., 1898, and within the ninety days allowed by the judge of this court for filing this bill of exceptions, and tenders this its bill of exceptions, and prays that the same be allowed, signed, sealed, and made a part of the record in this cause, which is accordingly done.

[Seal United States Court in the Indian Territory, Southern District.]

HOSEA TOWNSEND,  
*Judge of the United States Court in and for the  
Southern District of the Indian Territory.*

61 UNITED STATES OF AMERICA, }  
*Indian Territory, Southern District.* }

I, C. M. Campbell, clerk of the foregoing district and Territory, do hereby certify that the foregoing 60 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of the said court, in the case of The Chickasaw Nation, appellant, vs. Richard C. Wiggs *et al.*, appellee-, No. 27, as the same remain upon the files and records of the United States court, Indian Territory, southern district, at Ardmore.

I further certify that the original citation in said cause, with the admission of service thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Ardmore, this 29th day of September, 1898.

[Seal United States Court in the Indian Territory, Southern District.]

C. M. CAMPBELL,  
*Clerk of the United States Court, Southern District,  
Indian Territory.*

Endorsed on cover: Case No. 17,081. Indian Territory U. S. court. Term No., 496. The Chickasaw Nation, appellant, vs. Richard C. Wiggs *et al.* Filed October 28th, 1898.





N<sup>o</sup>. 423.

*Dep. of Garland & Garland for*  
*Opps.*

Office Supreme Court U. S.

FILED

DEC 10 1898

JAMES H. MCKENNEY

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*Filed* *Oct. 10, 1898.*  
**Supreme Court of the United States.**

October Term, 1898.

WILLIAM STEPHENS et al.

vs.

CHEROKEE NATION.

} No. 423.

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APPEAL FROM THE INDIAN TERRITORIAL UNITED STATES COURT.

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A. H. GARLAND,  
R. C. GARLAND,  
Attorneys for Appellants.

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MCGILL & WALLACE, LAW PRINTERS, Washington, D. C.





IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1893.

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WILLIAM STEPHENS <i>et al.</i>	} No. 423.
<i>vs.</i>	
CHEROKEE NATION.	

---

**Appeal from the Indian Territorial United States  
Court.**

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Come the appellants and state and show to the court that the case involves the question of citizenship of certain parties in the Cherokee Tribe of Indians, and the right of appeal from the Territorial court to this court is given by the Act of Congress, approved July 1, 1898, called "The Indian Appropriation Bill for the fiscal year ending June 30, 1898," (Public Act No. 175); and such act, among other things, provides, as follows:

"In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible"—

Wherefore, they move the court to advance said cause for hearing at as early a day at the present term as the convenience of the court may permit.

A. H. GARLAND,

R. C. GARLAND,

*Attorneys for Appellants.*

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And counsel for the appellants state and show that precisely the same general questions involved in No. 423 are involved also in—

Nos. 460, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 592, 593, 598, 599, 600, 601, 608, 609, 612, 613, 614, 615, 616, 617, 618, 619, and that the attorneys for appellants in this case are the attorneys for each and all of the parties in the above designated numbers, and they now move for a similar order of advancement of those cases to be heard along with No. 423; and they append herewith a list of the cases above indicated by number.

A. H. GARLAND,

R. GARLAND,

*For Appellants.*

**Docket of citizenship cases for A. H. and R. C.  
Garland.**

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Mary E. Truitt <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 460. Indian Territory United States Court.
Juletta Jordan <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 464. Indian Territory United States Court.
Caleb W. Hubbard <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 539. Indian Territory United States Court.
Delphian McAnally <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 540. Indian Territory United States Court.
Mary L. Brashear <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 541. Indian Territory United States Court.
S. K. Coudry <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 542. Indian Territory United States Court.
Mariam A. Dial <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 543. Indian Territory United States Court.
W. P. Munson <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 544. Indian Territory United States Court.
George Hubbard <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 545. Indian Territory United States Court.

Louisa E. Trotter <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 546. Indian Territory United States Court.
Samuel C. Hill <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 547. Indian Territory United States Court.
P. G. Russell <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 548. Indian Territory United States Court.
Mary E. Baird <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 549. Indian Territory United States Court.
Mozart Binns <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 550. Indian Territory United States Court.
Catherine V. Smith <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 551. Indian Territory United States Court.
Thomas Henley <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 552. Indian Territory United States Court.
Hezekiah Henley <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 553. Indian Territory United States Court.
William M. McGee <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 554. Indian Territory United States Court.
Mary A. Singleton <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 555. Indian Territory United States Court.
Elizabeth A. Brown <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 556. Indian Territory United States Court.

Hannah Flippin <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 557. Indian Territory United States Court.
J. M. Gambill <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 558. Indian Territory United States Court.
Mary F. Brewer <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 559. Indian Territory United States Court.
Joseph M. Abercrombie <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 560. Indian Territory United States Court.
William J. Watts <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 561. Indian Territory United States Court.
Agnes D. Hockett <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 562. Indian Territory United States Court.
Elizabeth Pace <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 563. Indian Territory United States Court.
George Teague <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 564. Indian Territory United States Court.
B. F. Earp <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 565. Indian Territory United States Court.
Eliza Mayberry <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 566. Indian Territory United States Court.
David Bailes <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 567. Indian Territory United States Court.

John G. Lloyd <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 568. Indian Territory United States Court.
A. W. Rutherford <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 569. Indian Territory United States Court.
Cynthia A. Braught <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 570. Indian Territory United States Court.
Eliza M. Black <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 571. Indian Territory United States Court.
A. M. and Fannie Archer <i>vs.</i> Cherokee Nation.	} No. 572. Indian Territory United States Court.
George D. Hopper <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 573. Indian Territory United States Court.
David C. Bayes <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 574. Indian Territory United States Court.
W. J. Rowell <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 575. Indian Territory United States Court.
Valinda Armstrong <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 576. Indian Territory United States Court.
Cynthia Gain <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 577. Indian Territory United States Court.
Susan S. Bennight <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 578. Indian Territory United States Court.



David Meredith <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 592. Indian Territory United States Court.
Sallie Poindexter <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 593. Indian Territory United States Court.
Chris. C. Steen <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 598. Indian Territory United States Court.
H. M. Couch <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 599. Indian Territory United States Court.
B. A. Presbey <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 600. Indian Territory United States Court.
John W. Elliott <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 601. Indian Territory United States Court.
Rebecca M. Walker <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 608. Indian Territory United States Court.
James H. Harrison <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 609. Indian Territory United States Court.
James B. Watts <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 612. Indian Territory United States Court.
James M. Hazlewood <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 613. Indian Territory United States Court.
David Frakes <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 614. Indian Territory United States Court.

Jefferson Harp <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 615. Indian Territory United States Court.
Francis Armstrong <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 616. Indian Territory United States Court.
Joseph W. Rogers <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 617. Indian Territory United States Court.
Robert Isbell <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 618. Indian Territory United States Court.
Samuel Wiltenberger <i>et al.</i> <i>vs.</i> Cherokee Nation.	} No. 619. Indian Territory United States Court.

N<sup>o</sup> 423.

By. of Garland, Garland &  
for Appellants

Office Supreme Court U. S.  
FILED

552 11 1899

JAMES H. McKENNEY,  
Clerk.

IN THE  
Filed Feb. 11, 1899,  
Supreme Court of the United States.

October Term, 1898.

WILLIAM STEPHENS et al.

vs.

No. 423.

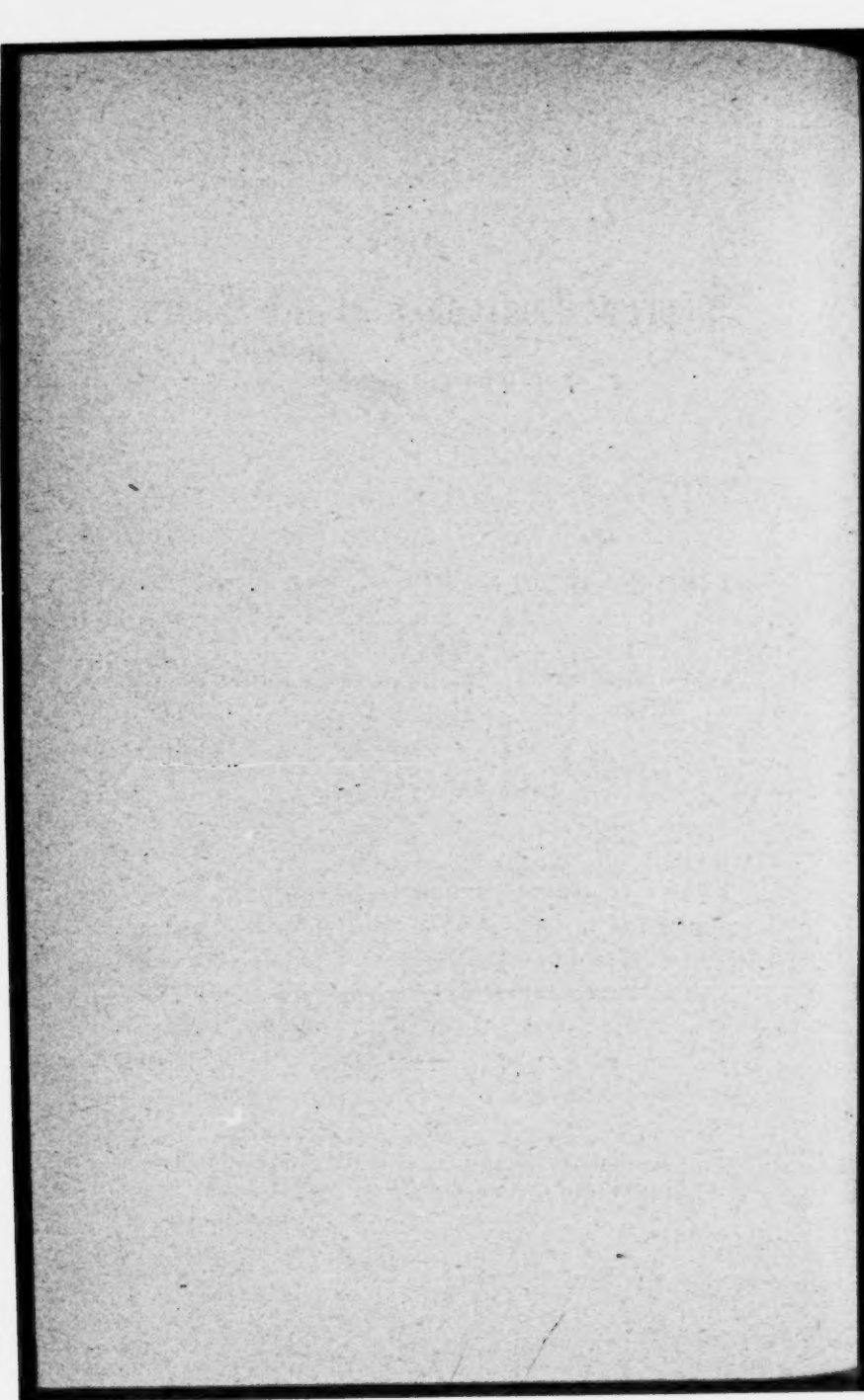
THE CHEROKEE NATION.

Appeal from the Indian Territorial United States Court.

## BRIEF FOR APPELLANTS.

M. M. EDMISTON,  
of Counsel.

A. H. GARLAND,  
R. C. GARLAND,  
H. J. MAY,  
Attorneys for Appellants.



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1893.

---

WILLIAM STEPHENS <i>et al.</i>	}	No. 423.
vs.		
THE CHEROKEE NATION.		

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**Appeal from the Indian Territorial United States  
Court.**

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**Brief for Appellants.**

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This case involves the question of citizenship of certain parties in the Cherokee Tribe of Indians, and the right of appeal from the Territorial court to this court is given by the Act of Congress, approved July 1, 1898, called "The Indian Appropriation Bill for the fiscal year ending June 30, 1898" (Public Act No. 175); and such act, among other things, provides, as follows:

"In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

There was much opposition by the delegates of the Cherokee Nation to the granting by Congress of the right of appeal to this court. The point of objection by them was, the act of June 10th, 1896, made the decision on appeal from the Dawes Commission (so called) final, and the matter was closed and could not be opened again; and some reliance was placed upon an act of Congress, of March 3, 1893, ratifying the *strip agreement*, as it is called, and some treaty stipulations are invoked against the giving this right of appeal.

We are not advised as to this matter, but we presume the same objection will be raised here. Congress granted the right of appeal, notwithstanding the protest of the delegates. This protest was based on the act of March 3, 1893, and the act of June 10th, 1896, and is, for the purposes of this argument, as follows:

"First. That all persons now resident or who may hereafter become residents in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or act of Congress, shall be deemed and held to be intruders and unauthorized persons, within the intent and meaning of Section 6 of the treaty of 1835 and Sections 26 and 27 of the treaty of July 19th, 1866, and shall, together with all their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon demand of the Principal Chief of the Cherokee Nation."

And the act of Congress of June 10, 1896, which reads as follows:

"That said commisson is further authorized and directed to proceed at once and hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however,* That such application shall be made to such commission within three months after the passage of this act.

"The said commissn shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said roll as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any person who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatever heretofore taken where the witnesses giving such testimony are dead or now residing beyond the limits of said Territory, and to use all fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the



true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

To this protest of the Cherokee Delegation, those asking for the right of appeal to this court presented a reply to the Congress of the United States; and looking over this reply again, we believe it contains all that is necessary to be said in this connection, and we present it as a part of this brief:

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" *To the Senate and House of*

*Representatives of the Congress of the United States:*

The petition of the "*Cherokee Delegation*" to strike out of H. R. 6896 Senate amendment allowing appeals to the Supreme Court of the United States in certain cases of citizenship deserves some special notice at the hands of those desiring such appeals, and leave is here asked most respectfully to present this reply thereto, and the hope is indulged that Congress will give it close attention.

The position of the petition as to granting this right being opposed to certain treaties is of no avail, as all of this legislation, from the creation of the *Dawes Commission*, so-called, to the last act on the subject, is over and above all treaties, and rests upon the broad and plenary jurisdiction of Congress in all Indian matters since we abolished the making of treaties with those people in 1871. That this jurisdiction exists to the fullest extent

is now one of the firmly and indisputably settled principles in our law, by various decisions of the Supreme Court of the United States, and by as many or more acts of Congress. The *Kagama case* (118 U. S., 375) settled this most explicitly, and this case has been followed and affirmed by several others since.

And so the Strip agreement of March 3, 1893, stands in the same category, and Congress has legislated in the face of it, from time to time, as the several acts on this subject most amply attest; and all this legislation must be set aside if this point of the "*Cherokee Delegation*" is of any value.

The assertion on page four of the petition as to the organized band of *intruders* and *their leader*, and the *base intention*, &c., is a bare-faced assertion, and if true has nothing earthly to do with the right here claimed. If this right is one in law, or entitled to be such, it can not be bargained away thus, and it is purely an assumption without proof, for if the report of the *Dawes Commission*, so-called, to the Secretary of the Interior November 18, 1895, is to be believed (see report of the Secretary of the Interior to Congress December, 1895, pp. 91-'2 *et seq.*) such a thing as an *intruder* in this connection does not exist; and we very respectfully ask Congress to examine that report and see how anxious it appeared to be to protect those people who are so recklessly and falsely charged as being *intruders*.

And on page 6 of the petition we are informed the "*Cherokee Delegation*" and *Nation* are well pleased with the decisions as they are. Doubtless, truly; yea, verily!

But there are other parties interested and on the record who are not so well pleased and satisfied. The "*Cherokee Nation*" is not alone concerned here. We will see after a while who else, what other parties, are directly and vitally interested and concerned, and how they will stand if these decisions are not reviewed.

Against the general proposition that a judgment or decree on a matter judicially before a court can not be opened, but is settled, is an adjudicated thing, we make no war. But the trouble is, these decisions are not final, they are all still *in fieri* before Congress for its action; and upon this broad jurisdiction of Congress over the whole subject of Indian matters and affairs, it may refuse the whole of this work, or a part of it, or it may take its own course and adopt a new scheme and method entirely. Then the work is before Congress for its action as it sees fit. When Congress looks into it, the first thing it finds is, staring it in the face, three different decisions at least, in the Indian country, holding different and actually antagonistic views. Now, which is final? If they are all final it is apparent the grossest injustice is to be done to many people in that country. The opinions of Judges Springer, Clayton and Townsend disagree widely, and they can not all be right. Are we to deal with a class of people in the Choctaw Nation one way and with a like class in the Chickasaw and Cherokee Nations in another? The thing is ridiculous and absurd. The sagacious Secretary of the Interior, in his report to Congress last December, said wisely, he wanted no plan or method of disposing of the many complicated

Indian questions that was not the same to all the tribes, as far as could be. And here we are asked to disregard this safe suggestion, and leave whole masses of people to be dealt with under these opposing, conflicting, and warring judicial interpretations. With all due respect, Congress owes it to itself, to these people all, and to the whole country to provide means to unsphinx this riddle, and have a uniform method of disposing of these all-important questions. Judge Springer's *finality* is as good as that of Judge Clayton, and that of Judge Townsend is as good as the *finality* of either. Now, then, in adjusting the whole matter, as this bill under consideration seeks to do, whose *finality* will Congress adopt? It can not, with propriety and decorum, adopt them all, and it might be offensive to the high judicial functionaries who passed upon these cases, to say no more, to make an invidious distinction in adopting one to the exclusion of the others. If these are all to be final, then Congress, instead of adjusting and settling matters in that country, leaves it in confusion worse confounded and in disorder bordering on chaos.

In the history of Congressional legislation organizing commissions to pass upon and decide disputes, or in giving the jurisdiction to do so to existing tribunals, how often have we seen Congress, by acts supplemental, giving the right to review when the original act made the findings of those commissions or tribunals final? The instances are many, and in the nature of things it must be so. We will cite one notable case, which goes even a bow-shot or two beyond what we ask here, and that case

will be conclusive, we take it, as the question made by the petition is on the power of Congress to open up these decisions of the District Courts, after the law said they should be final. Here, then, is the sole question—one of power of Congress to do this!

*Sampeyreac & Stewart v. The United States* (7 Peters, 222) came up on an act of Congress of 26th May, 1824, to settle claims of parties to lands in Missouri and Arkansas, within a certain specified time, and under this act *Sampeyreac* filed his petition, and after full proceedings had, he obtained a decree confirming his claim. Appeal was provided for in the act of 1824, to be taken within one year after judgment, and if no appeal should be taken within that time, the judgment should be *final* and *conclusive*.

In this case more than a year elapsed and no appeal was taken, and in 1830, after the time had passed for an appeal, Congress passed an act allowing bills of review to be filed in any or all of these cases, and extended the time in which to do this. Under this act of 1830, the United States filed a bill of review, and the Superior Court of Arkansas sustained the bill of review, and on the hearing set aside its former decree and rendered one in favor of the United States, and *Sampeyreac & Stewart* appealed, and the Supreme Court of the United States affirmed that decree of the Superior Court of Arkansas on the bill of review. The very identical question was raised in that case as is here, viz: "The act of 1830 was unconstitutional, as a right had become vested in *Stewart* before the act was passed, and the effect and operation

of the law was to deprive him (Stewart) of a vested right." Here the "*Cherokee Delegation*" contend the granting of this appeal will deprive their Nation of a vested right! The court held the act of 1830, providing only a remedy, was unexceptionable; that the retrospective operation of such a law forms no objection to it; that almost any law providing a remedy affects and operates upon causes of action existing at the time the law is passed. (P. 237.)

All there is of it here is, these decisions are final with respect to the remedy given under the original act, but now we ask for a new and additional remedy, which Congress is competent to give. There is no such thing known in the law as a vested right to a particular remedy. Surely there can be nothing left of this objection when Congress can grant reviews long after the decision is *final and conclusive* under the original act giving a remedy at all. Certainly this case tears to pieces and throws to the winds the objection that Congress can not give and provide here a still further remedy to pursue what these people claim. More citation of authorities would be useless.

And it is respectfully submitted that Congress has this power, unlimited and unrestricted; and it is its duty to exercise it now, to relieve, for all time, against a strange, singular, and unjust condition of affairs in that country, where Congress must see that justice is done.

And these are dear and close questions to the people interested, and, in fact, of great importance to us all—worthy, in all respects, of the full consideration and unbiassed judgment of the highest court of the land, and

no one of us should dread or fear a submission of them to that tribunal.

Very respectfully,

A. H. GARLAND and  
R. C. GARLAND,  
*Attorneys for Watts, Hubbard  
and others asking appeals."*

"APRIL 15, 1898."

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Some question has been made as to the power of Congress to authorize appeals from the Dawes Commission to the United States courts in the Indian Territory as appeals can not be prosecuted to a court from a mere commission. This has been touched upon in the brief before Congress above submitted. But we think it is set at rest by this court, in *The U. S. v. Ritchie*, 17 How., 525; and more is not needed on this point.

Another question, that Congress could not legislate on the subject of citizenship among these tribes, but it is a matter entirely for the local authorities there to dispose of under local laws and customs. The almost unlimited control and management by Congress of the Indian affairs, since 1871, when we ceased to make treaties with them, disposes of this objection. We refer in support of this view to the case of *Kagama* (supra), which has been followed and reaffirmed by this court several times since.

But in this particular inquiry, as to the Cherokees, all difficulty, if any existed, is removed by the very first treaty ever made by these people with the United States, dated November 22d, 1785. Article 3 of that treaty ex-



pressly provides "That said Indians, for themselves and for their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whatsoever;" and article 9 of the treaty provides "For the benefit and comfort of the Indians and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such a manner as they (the United States in Congress assembled) think proper." (See vol., *Revision of Indian Treaties*, p. 27), and therein cited towards the close of Judge Springer's opinion. These provisions have never been repealed or abrogated, and they are certainly broad enough to sustain the legislation by Congress in respect to the settling of this citizenship question.

What, then, did Congress do, or attempt to do, in dealing with this matter of settling the right of citizenship in these tribes? In searching for the meaning of legislation of this character, the history of the times, and the surroundings generally, when the legislation is had, furnish the best means for solving the question.

*United States v. Union P. R. R. Co.*, 91 U. S., 72.

*Aldridge v. Williams*, 3 How., 9.

*Dist. Columbia v. Washington, &c.*, 103 U. S., 243.

*Endlich Int.*, secs. 20-23, 26-29, 30-31.

But of this exposition from and by the light of the times, the statements and speeches of the legislators form no part—they can not be resorted to for the purpose of interpreting and constructing the statute.

The presentation of the laws, customs, and usages of the Nation as to enrollment for many years previous to the creation of the so-called Dawes Commission is fairly stated, in their chief elements, by the brief of the Nation and in the opinion of Judge Springer, and we will not quarrel with that, and will merely remark the court will observe that in the Nation's legislation and the rules promulgated thereunder, constantly occur in this connection BLOOD and DESCENT. These are not meaningless or empty words, they cannot be read out of the procedure to subserve any ends. They are potent and strong words, and are as much entitled to their place in these laws and rules as any words contained in them, and after a while we will see just how they are operative and how they contributed to bring about the present legislation by Congress. It is quite interesting and no less instructive. We find that long previous to, and at, the time the so-called Dawes Commission, with trembling limbs, entered into the Indian country, under its powers given by Congress, the ROLL was all-powerful and paramount, and by it alone stood the citizenship in the Nation. But when this commission came and began to look into and uncover these and other matters there, they were abashed, turned pale and almost sickened. In their report, November 18, 1895, to the Secretary of the Interior, they inveighed against it in no measured terms, and denounced it in language that almost made the current of blood run backwards. "Political football," "glaring instances," "miscarriage of prosecutions," "surprising and shocking," "disregard of the plainest

principles of law," "grossest injustice proved," "consummation of a great wrong," "to deprive them of the houses and property acquired," are a few of the inspiring and savory words employed by such commission to name and define this matter of the ROLL. (See the report of the Secretary of the Interior to Congress, December, 1895, 90-93.) And the commission fervently invoked Congress to bring a halt, and prevent the huge wrong contemplated by this kind of enrollment! This report is full of healthful and tonic reading, and is commended for its sincerity, fairness, and truthfulness. It is needless to quote from it further, as it is a public document, and must be judicially known to this court. It is, then, plain, perfectly so; such commission was disgusted with the ROLL business, from the very bottom of their souls, and they called aloud for corrective legislation. This was submitted to Congress at its meeting in December, 1895. Here, now, a mischief, screaming and howling mischief, was pointed out, and a remedy was asked and implored. All this that was arraigned had been done under the *laws, customs, and usages* of the Nation as asserted by counsel for the Nation in argument below. But all this was an abuse of the grossest character, and Congress, so recognizing, undertook to correct it. Did Congress ratify and approve this mode of proceeding? By no means. If Congress had, it would have said so in just so many words, and it had all the English language to select from to say so. But, instead of that, recognizing the burning mischief so vehemently and eloquently pointed out by the commis-

sion, enacted a statute, nearly a full page in length. (Stats., 1st sess., 54th Cong., page 339, June 10, 1896.)

What did that statute do or seek to do? It empowered this commission to hear the applications of ALL PERSONS. Hear and determine legally means more than to examine a ROLL and adopt it. In determining these matters the commission was to respect the laws, customs, &c., of the Nation, when it could be done consistently with the laws and treaties of the United States. Of course they were to respect those laws and customs, where it could be done safely to the end sought, and in the same manner due force and effect were to be given the ROLLS—but all this had to be done in pursuance of the policy of correcting a most shameful proceeding that was there, in black and white, before Congress. It was simply this, and no more—"You must take the ROLL as far as it goes as correct; you will not examine into the right of anyone already there—you will not knock off anybody." This is plain! Then what else? "You will see if there are any others not on there who ought to be:—consider, or *hear* and *determine* applications to get on that ROLL"—this, taken in connection with the whole history of the matter, makes the statute plain and reasonable. After all this investigation and report, and work and labor, that Congress undertook simply to have the ROLL confirmed is not tenable—it is folly to talk about it. Two and a half lines of a statute would have sufficed for this. In other words, it is claimed that Congress directed this commission to receive and confirm what they had, only five months be-

fore, condemned in most explicit and unmistakable language! Impossible.

But further, in order to give the commission full power to do this, they are directly authorized to send for persons and papers, administer oaths, take depositions, and examine witnesses, providing for the use of testimony of persons deceased, to use every fair and reasonable means within their reach for the purpose of determining the rights of applicants for citizenship. All this was wholly unnecessary, if the commission had only to examine the ROLLS and put them in shape and adopt them. An appeal from such a decision would be valueless; there would be nothing to appeal from. Why this great power—a judicial power—to swear witnesses, take testimony, &c., if they had simply to see if the applicant's ancestor was on the ROLL! The commission had already said the ROLL was a "football political," made and unmade as a child does its little cob house. If people were refused such ROLLS, or were struck off so fraudulently, as the commission asserted, were they not empowered to enquire into all this? If one's ancestor had been stricken out so outrageously as the commission claimed, could they not examine this and let in the applicant through the blood of that ancestor? It is impossible to tell what they were for, if they could not do this. This was to remedy the evils complained of, and to give these people rights they were entitled to, and would have secured if these indecent and unblushing frauds, as set forth by the commission, had not been perpetrated.

BLOOD and DESCENT run through the laws and regulations of the Nation, as we have seen. Yet, in flagrant violation of all this, as the Dawes Commission emphatically remarks, the Chief of the Nation observed them or not as he pleased. We have it by report of the Dawes Commission, many of these people came on the invitation of the Nation, in order to get their blood together at one home, and they settled there and raised families and became good citizens with that view. Yet the same report says, they were refused admission to the ROLL, or put on in some instances and taken off without hearing and without notice. To correct these, the Dawes Commission was empowered to look into and pass upon these matters as a court. It was their report that brought forth this law, and upon the laws and facts touching the race, blood, and other things this question must be heard and determined. A person says generally he is rightfully entitled to be a citizen of the Cherokee Nation. Does not this carry with it, in the first impression, his blood is of that tribe of people, and he is a descendant of a Cherokee or of Cherokees? If a Mongolian comes and says he is of right a Cherokee citizen, the thing is laughable, or if an African does. But if one says his blood is Cherokee and therefore he is entitled to be a citizen, this we understand, and the inquiry begins. The whole idea, in the first instance, must be predicated upon the blood. And it was to go—all their race in and under one fold when the Cherokees called for the outsiders, as they termed them, to come in. And the kind and manly interposition of the so-

called Dawes Commission was to protect people of the tribe—people of the blood—people descended from the old Cherokees of the woods; and to protect them under this powerful appeal of this high tribunal, Congress enacted this law—that is the plain, unvarnished, and direct history of the matter. And no legal legerdemain can avoid it—no overriding desire to beat the tribes out of their existence can escape it—and no ugly names applied, such as Intruders, can blink or wink it away. The masterly report of the so-called Dawes Commission repels and overturns most completely the idea of Intruders, and shows it as misapplied as to those affairs here discussed. The court will bear in mind, this is a remedial statute—passed to remedy evils, according to the report of the so-called Dawes Commission, that cried aloud to Heaven and smelled badly in the nostrils of all decent people. Courts favor remedial statutes and construe them most liberally to bring about the remedy.

Endlich Sup., 107-110 and 112, and notes.

So regardful are the courts of this view as to remedial statutes, they have held the words "single man" to embrace an unmarried woman:

*Silver v. Ladd*, 7 Wall., 219.

And the rule, acquisition of citizenship by descent or extraction, is a natural law, one which governs all mankind all the world over.

Webster on Citizenship, p. 109.

Congress, looking to getting the tribal relations of



these people extinguished, concluded it must first be known and made to appear who were Cherokees—of the race of Cherokees—of the blood of Cherokees—before all this and other things could be done, looking to the final disposition of those tribes—tribes of certain blood, tribes of certain races. And this inquiry was one of the steps to do it. Congress took hold of this whole matter in earnest, and by this act legislated upon the entire subject, wiping out and setting aside all previous acts of any legislature or body inconsistent with it (*The United States v. Tyner*, 11 Wall., 88); and this act provides the full measure of relief in these affairs. And we ask Cherokees, absolute and actual and real Cherokees by blood, be placed on these ROLLS; that the ROLLS heretofore made, being, as the commission say, partial, unjust, and almost disreputable, be corrected and supplied by adding as pure and good Cherokee blood to them as can be found on them anywhere. Only this and nothing else. And the decision of the Dawes Commission failing to do this is grossly erroneous and wrong, and so is the judgment of Judge Springer affirming that decision, as were the ROLLS heretofore so loudly and unsparingly denounced by the commission in their report of 1895; and those decisions, as Old Lord Chief Justice Wilmut used to say, “should be reversed with indignation.”

The opinion of Judge Springer, in construing the question of *Blood and Descent v. Enrollment*, is appended hereto in full, that the court may see all there is of the question on both sides, so far as this general proposition goes. The opinion goes back to the Pleistocene if not to

the Azoic age, and it is not wanting in length, but it is only proper it be given in full.

It is not difficult to bring the present case within the rules of law which we contend should prevail, and we now call the attention of the court briefly to the material facts in the record.

The case was tried before the Dawes Commission on the issues framed by petition of the applicants and a demurrer and answer combined thereto by the Nation, and judgment was rendered against the applicants.

The demurrer and answer (Rec., 20, 21) to the petition are as follows :

" Your respondent, S. H. Mayes, principal chief of the Cherokee Nation, comes now and demurs to the said application, and for the grounds thereof says :

1st. That this commission has not jurisdiction over the parties or subject-matter of this controversy and no legal right, therefore, to hear and determine the same.

2nd. That the application does not state facts sufficient, if true, to show that the applicants are entitled to citizenship.

Respondent, not waiving his aforesaid demurrer, but insisting upon the same, for answer to said application says that William Shoe Boots, through whom the petitioners claim to derive their right to citizenship in the Cherokee Nation, is not now and has not been a citizen of the Cherokee Nation since the removal of said Nation west to the Indian Territory, as at present located and defined; that the name of William Shoe Boots does—appear on the authenticated rolls of 1857 of said Nation; that neither they nor any of their ancestors now reside or ever have resided in the Cherokee Nation and Indian Territory as citizens thereof.

Respondent, for a further and complete defense to the aforesaid application, says that heretofore said applicant was made before a legally constituted court or commis-

sion on citizenship having jurisdiction over applicants for readmission to citizenship in the Cherokee Nation; that the said case was tried upon its merits; that upon a final hearing judgment was duly given against the applicant and in favor of this Nation. A duly certified transcript of the aforesaid proceedings and judgment are annexed hereto and made a part of this answer. Some of said proceedings, having been filed with the respondent's petition, are not included. Respondent further alleges that the case of William Shoe Boots was tried at the same time, a negro deriving his rights through the same ancestor, as shown by the decision of the commission. The depositions, affidavits of witnesses, all of whom are now dead, are also attached hereto, together with other testimony.

Having fully answered, your respondent asks to be hence dismissed."

The case being appealed from the Dawes Commission to the Indian Territorial court, that court tried it *de novo*, first referring it to a special master for report on all the facts, and the special master made quite an elaborate report (Rec., 39-47), in which he found, after reviewing all the testimony he had taken, in substance, as follows:

"Reviewing all of the above evidence, I am forced to the conclusion that the old Capt. Shoe Boots, Teaskiyarga, was a full-blood Cherokee Indian; that he married a full-blood white woman by the name of Clarinda Ellington, and there were born to them three children as the issue of said marriage, two sons and one daughter, one of his sons being William Ellington Shoeboots, who afterwards adopted his mother's maiden name, William Ellington. One of the witnesses thinks the daughter's name was Annie, but others say her name was Sarah. The other son was named John Shoe Boots. The daughter Sarah or Annie was the mother of the appellant William Stephens, and was a half-blood Cherokee Indian.

I find from the sworn petition that it is the history of the Shoe Boots family that Captain Shoe Boots, Teaskiyarga, captured his wife in Kentucky and carried her to Georgia, and she was a white girl named Clarinda Ellington, and, as above stated, there were born to them three children. The relatives of Clarinda Ellington, upon learning of her whereabouts, went to old Shoe Boots, and, upon a promise to return them, prevailed upon him to permit his wife, Clarinda, and her children to visit her relatives and the home of her childhood in Kentucky. They never returned to their husband and father. Sarah afterwards moved to the State of Ohio and married Robert Stephens, a white man, and there was born to them this applicant, William Stephens. William Stephens came to this country over a quarter of a century ago, where he has continuously resided in the Cherokee Nation. He came here under an invitation issued by Chief Downing for all non-resident Cherokees to come to the Cherokee Nation and make it their home. Soon after he came he made application for his mother and for himself to be readmitted as citizens of the Nation. The commission who heard this case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application upon a technical ground. Upon this report Chief Mayes, on a message to the general council, stated his confidence in the honesty and genuineness of the claim of the applicant and wanted the council to pass an act recognizing applicant as a full citizen, but somehow this was never done.

I find, as above stated, that William Stephens came here over twenty-five years ago, and has in good faith sought to become a citizen of the Cherokee Nation, relying solely upon the justness of his cause and his unquestioned Cherokee blood to readmit him as a citizen. He has improved a considerable property in the Cherokee Nation, and has continuously lived here as a Cherokee citizen, and at one time was permitted to vote in the Cherokee elections.

The Cherokee Nation does not deny the fact that the appellant, William Stephens, has Cherokee blood, but contends that the mother of the said Stephens was of

African or negro blood, and by reason of this fact should not be admitted to citizenship.

I do not think it necessary to comment upon this as a legal question in the case, but I am convinced from a great preponderance of the evidence that the mother of Stephens had not a drop of negro blood in her veins; but, to the contrary, she was one-half white and one-half Cherokee, as claimed by the appellant, Stephens, thus making Stephens a quarter Cherokee Indian and three-quarters white.

I find that Mrs. Mattie J. Ayers is a daughter of William Stephens, thus making her one-eighth Cherokee Indian and seven-eighths white, and there was born to the said Mattie J. Ayers in lawful wedlock the following living children: Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers.

I therefore conclude that William Stephens and his daughter, Mattie J. Ayers, and her children, Stephen Grant Ayers, Jacob Sherman Ayers, and Mattie Ayers, are all Cherokee Indians by blood, and untainted with any negro or African blood."

The court below in passing upon this report took no issue with any fact in it, but conceded it clearly set forth all the facts in the case. (Rec. 50.) After briefly stating some of the testimony and indulging in a few remarks thereon, the court thus concludes:

*"The evidence fails to disclose that he [the ancestor] has ever applied to any of the commissions that had jurisdiction to admit him as a citizen of the Cherokee Nation. The commission to which he did apply for enrollment as a citizen of the Cherokee Nation having held that as his name did not appear upon any of the Cherokee rolls of citizenship, his application was rejected. He never having been admitted to citizenship as required by the constitution and laws of the Cherokee Nation, the judgment of the United States commission rejecting this case is confirmed, and the application of the claimants to be enrolled as citizens of the Cherokee Nation is denied."* (Rec. 51-2.)

The BLOOD and DESCENT of these applicants (appellants) are established as clearly as can be, and the proof of residence and the possession of improvements upon property in the Nation is also as clearly shown; and that Wm. Stephens, the ancestor in this application came into the Nation under the invitation of Chief Downing, over twenty-five years ago, *for are all non-resident Cherokees to come to the Cherokee Nation and make it their home*; that he had been denied his application for citizenship on *mere technical grounds*, although the commission applied to was convinced of the genuineness of his claim to Cherokee blood. (Master's Rep., *supra*.) The call upon these people to come within the Cherokee fold, we take it, was sincere, and it was done evidently with the view of collecting together, as far as may be, the entire Cherokee blood, and this end, we submit, was not to be defeated or thwarted by any mere technical methods. No more thoroughly recognized and understood principle of law exists than when a person does all he can to secure his rights, the neglect or refusal of officials to do their duty in the premises will not prejudice him.

Lythe v. The State, 9 How., 333.

But aside from this, Congress, by act of June 10, 1896, in view of all these complications and embarrassments surrounding this question in the Nation, said, after being urged so to do by the Dawes Commission (see Report, *supra*), we will take charge of this whole subject, and establish a rule by which all these applicants,

or those desiring citizenship, may be heard, regardless of formalities before a proper tribunal, and while the rolls as they now exist, as to persons already on them, there will be no disturbance, yet all who think they should be there by virtue of *blood and descent* will be heard, and their claims fully and fairly adjudicated. As we have seen, this is the undoubted meaning of the statute. So when the court below denies admission because the ancestor was never admitted by the local authorities, it begs the question entirely. If he had been admitted, it is safe to say, this application would not have been made. It is because he was not admitted this application is made. Congress did not disturb the enrollment of persons already made, but in view of the fierce denunciation by the Dawes Commission, of trifling with claimants and denying many of them citizenship, it allowed those of that class to come forward anew and produce testimony of all sorts, and have their claims *heard and determined*. If the act of Congress did not mean this, it was entirely unnecessary and superfluous. What! the high commission, aided by Congress, composed of ex-United States Senators and ex-members of Congress, given authority merely to see if certain rolls contain the names of A, B, C, &c., and if so, all right, they are citizens; and if not, then they are not citizens, and must not be. The proposition is a ponderous one. If this were all, a fair business chap in a mercantile establishment or pawnshop or any president of a well-organized football team out there could have done this just as well as the distinguished men to whom Congress did confide the whole matter. Oh, no;



Congress gave them great judicial power—to coerce witnesses, to take testimony of all kinds needful, and to *hear and determine*, in short, whether certain persons who are not on those rolls should not be there.

And the Act of Congress of June 7, 1897 (Ind. Appropriation Act, 1st Sess., 55th Cong., title, Miscellaneous, p. 84), amendatory of the act of 10th of June, 1896, confirms to the letter the view we here take in defining the word *rolls* of citizenship as used in the act of June, 1896—that is, the last authenticated rolls of each tribe which have been approved by the council of the Nation, and the *descendants* of those appearing on such rolls, and such additional names and their *descendants* as have been subsequently added, either by the council of such Nation, the duly-authorized courts thereof, or the commission under the act of June 10, 1896; and all other names appearing upon such rolls shall be open to investigation by such commission for a period, etc., etc. This provided what sort of rolls already made should stand, and what names appearing there in certain shapes should be stricken off. But this amendatory act said nowhere there should be no names of Cherokees by *blood and descent* should be added to the rolls—by no means; indeed, as we have seen, the chief object of the whole remedial act was to allow persons, who were not on the rolls for the one or the other reason, an opportunity to show they ought to be there, and to be put there if they showed they were entitled to citizenship.

Some of the numerous cases before this court turn upon the question of being stricken from the rolls after

admission thereto, but this is not one of them ; this, as we have seen, stands on different grounds.

Claimants here show their right by blood and descent, conjoined with residence, improvements, and property generally, and it is submitted they come within the meaning and intention of the act of Congress.

And we repeat here the assignment of errors in the record (Rec., 52): The court erred in not admitting the parties to citizenship, in refusing them citizenship; the court, finding the parties were Indians, should have directed their enrollment.

And it is respectfully submitted the construction by the court below of the act of Congress was narrow and constipated, and its decree should be reversed and direction given to enter a decree ordering the enrollment of these parties.

A. H. GARLAND,

R. C. GARLAND,

H. J. MAY,

*For Appellants.*

## APPENDIX.

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IN THE UNITED STATES COURT FOR THE NORTHERN  
DISTRICT OF THE INDIAN TERRITORY, SITTING AT  
MUSKOGEE.

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**In the matter of the application of certain persons  
to be enrolled as citizens of the Cherokee Nation.**

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**Opinion of William M. Springer, Judge.**

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### **Jurisdiction of the Court.**

The subject of citizenship in the Cherokee Nation has occupied a large share of public attention in that Nation during the past twenty-six years. It has been the cause of numerous acts of legislation by the Nation and by Congress, and also has entered largely into the administration of the Interior Department of the Government.

One of the learned counsel for claimants to citizenship in the Cherokee Nation refers, in the opening of his argument, to the importance of the subject, as follows :

“Of all the new questions and vexing problems that have come before and called for the judgment of this court, no one has been of such momentous consequence and so fraught with vexation as those this court must entertain and determine in the cases of claimants to Cherokee citizenship which are now pending.” (G. B. Denison's Brief, p. 1.)

The number of persons interested in cases now pending before this court on appeal from the United States commission is believed to be in excess of 5,000, and that about 4,000 of these persons are applicants for citizenship in the Cherokee Nation. The property rights involved

will aggregate many millions of dollars, to say nothing of the social and political conditions which are affected. This court approaches the subject with a conviction of inability to do justice to all who are concerned. No pains have been spared, however, for a thorough and exhaustive consideration of all the laws, decisions of the courts, and treaties which bear upon the question.

All persons whose interests are involved have had a fair and impartial hearing. The court is not responsible for the laws; it is only responsible for their application to pending cases. If injustice has been done to anyone, the court regrets it exceedingly. An honest purpose has actuated the court in all cases, and it asks that the consequences for any seeming injustice may be attributed, in part at least, to the law-making power, and not to the court, whose duty it is to construe and enforce the law as it may exist.

Congress has made the decision of this court final in these cases. It is possible that those who may be dissatisfied (and there will doubtless be many) will petition Congress for a reopening of their cases and for further judicial investigation and determination. To the granting of such petition this court can have no objection whatever. It only regrets that an appeal was not provided to a higher tribunal, in order that the responsibility could be divided, and that a greater concurrence of judicial authority might be procured.

This court submits to all concerned, and especially to the legal profession, the result of its deliberations in these cases, with a conscientious belief that the law has been justly interpreted and impartially applied in all cases, and that its judgments may be approved by all fair-minded men.

On the 10th day of June, 1896, the act making appropriations for the Indian Service for the year ending June 30, 1897, was passed. Prior thereto Congress had, by act approved March 3, 1893 (27 Stat. at L., 645), authorized the appointment of a commission to enter into negotiations with the five civilized tribes, known as the Cherokee, Choctaw, Chickasaw, Muskogee or Creek and the Seminole nations, for the purpose of extinguishment of tribal titles to the lands within the Indian

Territory. This act conferred no powers upon the commission except to negotiate and report. The act of June 10, 1896 (29 Stat. at L., 321), for the first time conferred upon the commission powers of an executive and quasi-judicial character, besides declaring a policy in regard to the government of the Indian Territory.

After making sundry appropriations for the Indian Service, the act of June 10, 1896, authorized the commission to the five civilized tribes to hear and determine the applications of persons who may apply to them for citizenship in any of said nations, and to make up the rolls of citizenship of the several tribes. As the provisions of this act not only define the powers and duties of the commission, but of this court, the text thereof, on this subject, is quoted at length, and is as follows:

"That said commission is further authorized and directed to proceed at once to hear and determine the applications of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled:

*"Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act. The said commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes.

*"And provided, further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizen-

ship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties, said commission shall have power and authority to administer oaths, to issue process for, and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever, heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said Nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes:

*Provided*, That if the tribe, or any person be aggrieved with the decisions of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court:

*Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

Those persons whose rights to citizenship has either been denied or not acted upon, and others mentioned in the first proviso above, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, with right of appeal to the United States court, as appears in the second proviso.

The provisions in the foregoing statute conferring jurisdiction upon this court are to the effect, that any persons aggrieved with the decision of the tribal authorities or the United States commission may appeal from such decision to the United States court, that the appeal shall be taken within sixty days from the decision of the tribal authorities or the commission, and that the judgment of this court shall be final.

There has been some contention as to whether the United States commission was such a judicial body as that appeals could be prosecuted from it to the United States court. It is not necessary to pass upon this question. Whether the cases which have been brought to

this court are technically on appeal, or whether they are instituted merely through the medium of the commission is immaterial; in either event this court may hear and determine them. By the rules of this court, heretofore adopted, each appellant or claimant has been practically accorded a trial *de novo*.

All the testimony that was considered by the United States commission is before the court. In addition thereto the privilege has been extended to all who have applied therefor to take additional testimony. Every claimant has been accorded the privilege of bringing before this court every fact which he may deem essential to the establishment of his claim to citizenship in the Nation. (See decision of the Supreme Court in the case of the United States *v. Ritchie*, 58 U. S. Rep., page 524.)

A very careful and exhaustive consideration has been given to all the cases, and especially to the laws, treaties and constitutional provisions, on which rights to citizenship depend.

### **Historical Review and the Case of The Eastern Band of Cherokees against the United States and the Cherokee Nation.**

In order to thoroughly understand the question of Cherokee citizenship, an historical review of the Cherokee Nation will be of interest. The Supreme Court of the United States, March 1, 1886, decided a very important case, which is known as that of the Eastern Band of Cherokee Indians against the United States and the Cherokee Nation. This case is reported at length in Vol. 117 United States Reports, pages 288 to 312. It was taken to the Supreme Court on appeal from the Court of Claims, and was by that court decided June 1, 1885. (20th Court of Claims Reports, pages 449 to 483.) The opinion of the court in each case was concurred in by all the judges. The opinion of the Supreme Court was pronounced by Mr. Justice Field, and that of the Court of Claims by Chief Justice Richardson. I have thus specifically mentioned this case on account



of its great importance and bearing upon the question of citizenship in the Cherokee Nation. I will adopt the Historical Review of the case which is found in the opinion of the Supreme Court of the United States, for the reason that it shows the construction which the Supreme Court put upon the treaties made with the Cherokee Nation. It is as follows :

" This case comes before us on appeal from the Court of Claims. It was brought to determine the right of the petitioners, called the Eastern Band of the Cherokee Indians, to a proportionate part of two funds held by the United States in trust for the Cherokee Nation. One of the funds was created by the treaty with the Nation made December 29, 1835, at New Echota, in Georgia, commuting certain annuities into the sum of \$214,000. The other arose from the sales of certain lands of the Nation lying west of the Mississippi River.

" The suit by the petitioners was authorized by an act of Congress, and it is brought against the United States and the Cherokee Nation. (22 Stat. at L., 581, chap. 141.) The United States, however, have no interest in the controversy, as they hold the funds merely as trustee. They stand neutral, therefore, in the litigation, although as a matter of form they have filed an answer traversing the allegations of the petition.

" The general grounds upon which the petitioners proceed and seek a recovery is, that the Cherokee Indians, both those residing east and those residing west of the Mississippi, formerly constituted one people and composed the Cherokee Nation ; that by various treaty stipulations with the United States they became divided into two branches, known as the Eastern Cherokees and the Western Cherokees ; and that the petitioners constitute a portion of the former, and as such are entitled to a proportionate share of the funds which the United States held in trust for the Nation.

" This claim is resisted, upon the ground that the two branches, into which it is admitted the Nation was once divided, subsequently became reunited, and have ever since constituted one Nation, known as the Cherokee

Nation, and that as such it possesses all the rights and property previously claimed by both, and that the petitioners have not, since the treaty of New Echota, constituted any portion of the Nation.

"To determine the merits of the respective claims and pretensions of the parties, it will be necessary to give some account of the different treaties between the Cherokees and the United States, and to refer to the several laws passed by Congress to carry the treaties into effect and accomplish the removal of the Indians from the former home east of the Mississippi to their present country west of that river.

"When that portion of North America which is now embraced within the limits of the United States east of the Mississippi was discovered, it was occupied by different tribes or bands of Indians. These people were destitute of the primary arts of civilization, and with a few exceptions had no permanent buildings, occupying only huts and tents. Their lands were cultivated in small patches and generally by women. The men were chiefly engaged in hunting and fishing. From the chase came their principal food, and the skins of animals were their principal clothing. The different tribes roamed over large tracts and claimed a right to the country as their territory and hunting grounds. Of these tribes, the Cherokee Indians constituted one of the largest and most powerful. They claimed the principal part of the country now composing the States of North and South Carolina, Georgia, Alabama, and Tennessee. Their title was treated by the governments established by England, and the governments succeeding them, as merely usufructuary; affording protection against individual encroachment, but always subject to the control and dispositions of those governments, at least, so far as to prevent, without their consent, its acquisition by others. Such superior right rested upon the claim asserted by England, of prior discovery of the country, and was respected by other European nations. There was no nation, therefore, to oppose this assertion of superior right to control the disposition of the lands, and to acquire the title of the Indians, except the Indians themselves; and by treaties with them from time to time

their title and interest were conceded to the United States.

"On the 28th of November, 1785, the United States made its first treaty with the Cherokees. (7 Stat. at L., 17.) It was concluded at Hopewell, on the Keowee, between commissioners representing the United States on the one part and the 'head men and warriors of all the Cherokees on the other.' By it the Indians, for themselves and their respective tribes and towns, acknowledged that all the Cherokees were under the protection of the United States, and of no other sovereign. The treaty promised peace to them and the favor and protection of the United States, on the condition of the restoration to liberty of certain prisoners whom they had captured, and of the return of certain property which they had seized. It also prescribed the boundary between them and the citizens of the United States of lands allotted to them for their hunting grounds. These lands embraced large tracts within the States mentioned. The ninth article provided that, for the benefit and comfort of the Indians and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States should 'have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such manner as they think proper.' By this treaty the Cherokees were recognized as one people, composing one tribe or nation, but subject, however, to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs.

"On the 2d of July, 1791, another treaty was made with the Cherokees, in which they were described as the 'Cherokee Nation.' (7 Stat. at L., 39.) Its representatives were designated as the 'chiefs and warriors of the Cherokee Nation of Indians;' and the first article declared that 'There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee Nation of Indians.' And the chiefs and warriors, 'for themselves and all parts of the Cherokee Nation,' acknowledged themselves and the Cherokee Nation to be under the protection of the United States, and of no

other sovereign. The treaty also renewed the agreement on the part of the Cherokees, that the United States should have the sole and exclusive right of regulating their trade and readjusting the boundary between the citizens of the United States and the 'Cherokee Nation,' by which the hunting grounds were reduced in quantity; and in consideration of this reduction the United States agreed to deliver certain valuable goods to the chiefs and warriors for the use of the Nation, and to pay to the Nation annually the sum of \$1,000. A further article increased the amount to \$1,500.

"The boundaries of the hunting grounds were from time to time changed by subsequent treaties, and by each succeeding one their extent was reduced; in consideration of which a larger quantity of goods were promised to the Nation; and the annuity was increased until, in the year 1805, it amounted to \$10,000. (7 Stat. at L., 43, 62, 93.) This annuity was regularly paid to the Cherokee Nation, as represented by the Indians occupying the territory east of the Mississippi River, until the treaty of July 8, 1817. (7 Stat. at L., 156.) That treaty originated from a division of opinion among the Cherokees as to their mode of life, which existed when the first treaty with the United States was made in 1785, and which had from that time increased. There were numerous settlements or towns within the territory allotted to the Indians. Those who occupied the upper towns, which were mostly in the State of North Carolina, desired to engage in the pursuits of agriculture and civilized life; while those who occupied the lower towns in the Valley of the Mississippi desired to continue the hunter life; and owing to the scarcity of game where they lived, to remove across the Mississippi River to vacant lands of the United States. As early as 1808 a deputation from the lower and upper towns, authorized by the Cherokee Nation, came to Washington to declare to the President their desires and inform him of the impracticability of uniting the whole Nation in the pursuits of civilized life, and to request the establishment of a division line between the two classes of towns. The treaty of 1817, which was made with the chiefs, head men, and warriors of the Cherokee Nation east of the Mississippi River, and the chiefs, head men,

and warriors of the Cherokee on the Arkansas River, recites the action of this deputation and the reply of the President to the parties, made on the 9th of January, 1809, which was, in substance, that the United States were the friends of both parties, and, as far as could be reasonably asked, were willing to satisfy the wishes of both; that those who remained might be assured of their patronage, aid, and good neighborhood; that those who wished to remove would be permitted to send an exploring party to reconnoiter the country on the west of the Arkansas and White rivers and higher up; that when this party should have found a tract of country suiting the emigrants and not claimed by other Indians, the United States would arrange with them to exchange it for a just proportion of the country they should leave, and to a part of which, according to their numbers, they had a right; and that every aid towards their removal and what would be necessary for them there would then be freely extended to them.

"The treaty recites that, relying upon these promises of the President, the Cherokees explored the country on the west side of the Mississippi and made choice of the country on the Arkansas and White rivers, and settled upon lands of the United States to which no other tribe of Indians had any just claim, and that they had duly notified the President thereof, and of their desire for a full and complete ratification of his promise. To that end, as notified by him, they had sent there agents with full powers to execute a treaty relinquishing to the United States their right, title, and interest to all lands belonging to them as part of the Cherokee Nation, which they had left and which they were about to leave, proportioned to their numbers, including with those now on the Arkansas those who were about to remove thither. The treaty then proceeds to recite that, to carry into effect in good faith the promise of the President and to promote a continuation of friendship with their brothers on the Arkansas river, and for that purpose to make an equal distribution of the annuities secured by the United States to the whole Cherokee Nation, its articles were agreed upon. These were, in substance, that the chiefs, head men, and warriors of the whole Cherokee Nation ceded to the United

States certain lands lying east of the Mississippi, and the United States, in exchange for them, bound themselves to give to the branch of the Cherokee Nation on the Arkansas as much land on that river and the White River as they had received, or might thereafter receive, from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the Nation on the Arkansas, agreeably to their numbers. The United States also agreed to give to each poor warrior who might remove to the western side of the Mississippi a rifle gun, with ammunition and other articles, to pay for all improvements of real value to their land, and to give of the lands surrendered to the United States to every head of an Indian family residing on the east side of the Mississippi, who might wish to become a citizen of the United States, 640 acres. It was also agreed that the annuity due to the whole Nation for the year 1818 should be divided between the two branches of the Nation, according to their respective numbers, to be ascertained by a census to be taken. Previous treaties between the United States and the Cherokee Nation were to continue in force with both of its branches, each to be entitled to all the immunities and privileges which the Old Nation enjoyed under them.

"On the 27th of February, 1819, another treaty was made with the Cherokee Nation (7 Stat. at L., 195), represented by its chiefs and head men. By it a further cession of lands was made to the United States, and it was agreed that the annuity to the Nation should be paid as follows: Two-thirds to the Cherokees east of the Mississippi and one-third to the Cherokees west of that river. This apportionment was based upon the estimate that those who had emigrated and those who were enrolled for emigration constituted one-third of the Nation, instead of upon a census to be taken, as mentioned in the treaty of 1817. The annuity, thus divided, was regularly paid as stipulated until commuted by the treaty of December, 1835, of which we shall presently speak.

"On the 6th of May, 1828, a treaty was made with the chiefs and head men of the Cherokee Nation of Indians west of the Mississippi. (7 Stat. at L., 311.) This was

the first time that the Cherokees west of the river were recognized so far as a distinct and separate political body from the Cherokees east of the river as to call for separate treaty negotiations with them. The treaty recited, as among the causes of it being made, that it was the anxious desire of the Government to secure to the Cherokee Nation of Indians, as well as those then living within the limits of Arkansas as those of their friends and brothers residing in States east of the Mississippi, who might wish to join their brothers west, a permanent home, which should, under the guaranty of the United States, remain forever theirs; and that the present location of the Cherokees in Arkansas was unfavorable to their repose, and tended to their degradation and misery. By it the United States agreed to put the Cherokees in possession of, and to guarantee to them forever, seven million acres of land which were specifically described, and which are situated in what is now known as the Indian Territory, and also to give and guaranty to the Cherokee Nation a perpetual outlet west of these lands, and a free and unmolested use of the country so far as their sovereignty and right of soil extended. They also agreed to pay for all improvements on the land abandoned; and, in order to encourage the emigration of their brothers remaining in the States, to give to each head of a Cherokee family then residing within any of the States east of the Mississippi, who might desire to remove west, on enrolling himself for emigration, a good rifle and certain other articles to make just compensation for their property abandoned; to bear the cost of their emigration, and to procure provisions for their comfort, accommodations, and support by the way, and for twelve months after their arrival at the agency. On the other hand, the chiefs and head men of the Cherokee Nation west re-ceded to the United States the lands to which they were entitled on the Arkansas under the treaties of July 18, 1817, and of February 27, 1819, and agreed to remove from the same within fourteen months.

"From this time until the treaty of New Echota, concluded December 29, 1835 (7 Stat. at L., 748), the Cherokees were divided into two branches, so far as consti-



tuting distinct political bodies, that the United States had separate negotiations with each; and on the 14th of February, 1833, by a treaty with the chiefs and head men of the Cherokee Nation west of the Mississippi, the United States renewed their guaranty of seven million acres of land, and of the perpetual outlet to the Nation west of those lands, and of the free and unmolested use of the country west.

"In the meantime (from the treaty of 1828 until the treaty of New Echota) the Cherokees remaining east of the Mississippi were subjected to harassing and vexatious legislation from the States within which they resided. The United States had, as early as 1802, agreed with Georgia, in consideration of her cession of western lands, to extinguish the Indian title to lands within the State. North Carolina claimed that the United States were under a similar obligation to extinguish the Indian title to lands within her limits, in consideration of a like cession of western lands, although there was no positive agreement to that effect. And with the extinguishment of their title, it was expected that the Indians themselves would be removed to the territory beyond the bounds of those States. At the time the treaty of 1828 was made a great deal of impatience had been exhibited by the people of those States at the little progress made in the extinguishment of the Indian title, and at the continued presence of the Indians. Severe and oppressive laws were passed by Georgia, in order to compel them to leave; and though less severity was practiced in North Carolina towards the Indians in that State an equally pronounced desire for their departure was expressed. Angry and violent disputes between them and the white people in both States, but more particularly in Georgia, were of frequent occurrence. (See case of Cherokee Nation v. Georgia, as reported in a separate volume by Richard Peters in 1831 (see 30 U. S. bk. 8, L. ed. 1); also a document called 'The Public Domain,' prepared by the Public Land Commission, and published as Ex. Doc. 47, H. of R., 46th Cong., 3d Sess., and Doc. No. 71 of H. of R., 23d Cong., 1st Sess.)

"The treaty of New Echota was made to put an end

to those troubles and secure the union of the divided Nation. It recites as motives to its negotiations, among other things, that the Cherokees were anxious to make some arrangement with the Government of the United States, whereby the difficulties they had experienced from residence within the settled parts of the country under the jurisdiction and laws of the State governments, might be terminated and adjusted, and they be reunited into one body, and be secured a permanent home for themselves and their posterity in the country selected by their forefathers, without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their choice, and perpetuate such state of society as might be most consonant with their views, habits, and conditions, and as might tend to their individual comfort and their own advancement in civilization. By its stipulations the Cherokees ceded to the United States all lands owned, claimed, or possessed by them east of the Mississippi River, and all claims for spoliations of every kind, for the sum of \$5,000,000, and agreed to remove to 'their new home' west of the Mississippi within two years from its ratification.

"The treaty also recited the cession to the Cherokee Nation by previous treaties of the 7,000,000 acres, and the guaranty of a perpetual outlet west of these lands, and a free and unmolested use of all of the country, so far as the sovereignty of the United States and their right to the soil extended; and also that it was apprehended by the Cherokees that in this cession there was not a sufficient quantity of land for the accommodation of the whole Nation, and, therefore, the United States agreed, in consideration of \$500,000, to convey by patent to the Indians and their descendants an additional tract of 800,000 acres; and that the lands previously ceded, including the outlet, should be embraced in the same patent. (Art. 2.) They also agreed to remove the Indians to their new home, and to subsist them one year after their arrival there, except that such persons and families, as the opinion of 'the emigrating agent' were capable of subsisting and removing themselves, should be permitted to do so, and should be allowed for all claims for the same \$20 for

each member of their families; and, in lieu of their one year's rations, should be paid the sum of \$33.33, if they preferred it. (Art. 8.)

"It was also agreed that after deducting the amount which should be actually expended for the payment for improvements, claims for spoiliations, removal, subsistence, and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of the treaty, the balance, whatever the same might be, should be equally divided among all the people belonging to the Cherokee Nation east according to the census completed, and such Cherokees as had removed west after June, 1833; and that those individuals and families that were averse to removal and were desirous to become citizens of the State wherein they resided, and such as were qualified to take care of themselves and their property, should be entitled to receive their due proportion of all personal benefits arising under the treaty for their claims, improvements, and their *per capita*, as soon as an appropriation was made to carry out the treaty. (Arts. 12, 15.)

"By the eleventh article, 'The Cherokees, believing it would be for the interest of their people to have all their funds and annuities under their own direction and future disposition,' agreed to commute their permanent annuity of \$10,000 for the sum of \$214,000, the same to be invested by the President of the United States as part of the general fund of the Nation.

"In the following year Congress made the requisite appropriation for the commutation, and according to the tenth article of the treaty the money was invested for the benefit of the whole Cherokee Nation which had removed or should subsequently remove to the lands assigned to it west of the Mississippi. This is one of the funds of which the petitioners claim a part in proportion to their numbers as compared with the citizens of the Cherokee Nation living west of the Mississippi on the territory ceded. The provisions of the treaty as to the investment, custody, and distribution of the income of this fund and all other funds belonging to the Nation, remained in

force until the treaty of July 19, 1866. The interest was paid over annually to the agents of the Cherokee Nation authorized to receive the same, and was subject to application by its council to such purposes as they deemed best for the general interests of their people. The treaty of 1866 (art. 23, 14 Stat. at L., 805) provided that all funds then due the Nation, or that might thereafter accrue from the sale of its lands by the United States, as provided for, should be invested in United States registered stocks at their current value and the interest on said funds should be paid semi-annually on the order of the Cherokee Nation and be applied to the following purposes, to wit., 35 per cent. for the support of the common schools of the Nation and educational purposes, 15 per cent. to the orphan fund., and 50 per cent. for general purposes, including reasonable salaries of district officers.

"Immediately after the ratification of the treaty of 1835 measures were taken by the Government to secure its execution and commissioners were appointed to adjust claims for improvements and facilitate the emigration of the Indians. But emigration proceeded slowly. Great reluctance to go was manifested by large numbers, and at last it became necessary to make a display of force to compel their removal. Major-General Scott was sent to the country with troops and instructed to remove all Indians except such as were entitled to remain and become citizens under the twelfth article of the treaty. The number that remained was between eleven and twelve hundred. They were without organization or a collective name. They ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided. The name of the Eastern Cherokees accompanied those who emigrated, to distinguish them from those who had preceded them and who were called Old Settlers.

"After the reunion of the Cherokee people on their lands west of the Mississippi, resulting from the execution of the treaty, and on the 12th of July, 1839, the following Act of Union between the Eastern and Western Cherokees was adopted ;

**"Act of Union Between the Eastern and Western Cherokees."**

"Whereas, our fathers have existed as a separate and distinct Nation, in the possession and exercise of the essential and appropriate attributes of sovereignty, from a period extending into antiquity, beyond the records and memory of man; and whereas, these attributes, with the rights and franchises which they involve, remain still in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819 between the United States and the Cherokee people, under which a portion of our people removed to this country and became a separate community (but the force of circumstances having recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore, we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major General Scott for their removal to this country

shall continue in charge of that business, with their present powers, until it shall be finally closed; and also, that all rights and titles to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforth vest entire and unimpaired in the Cherokee Nation as constituted by this union.

“Given under our hands at Illinois camp grounds this 12th day of July, 1838.

“By order of the National Convention.

“GEORGE LOWERY,  
*President of the Eastern Cherokees.*

<sup>his</sup>  
GEORGE X GUESS,  
<sup>mark.</sup>  
*President of the Western Cherokees.’*

“On the 6th of September following they adopted a constitution of government, in which they recited that the Eastern and Western Cherokees had become reunited in one body politic under the style and title of the Cherokee Nation. The second clause of its first article is as follows:

“‘The lands of the Cherokee Nation shall remain common property, but the improvements made thereon and in possession of the citizens of the Nation are the exclusive and indefeasible property of the citizens, respectively, who made or may rightfully be in possession of them: *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements as expressed in this article shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limits of this Nation and become a citizen of any other government all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, That the national council shall have power to readmit by law to all the rights of citizenship any person or persons who may

at any time desire to return to the Nation on memorializing the national council for such readmission.'

"But notwithstanding this declared reunion of the divided Cherokees, there was much bitter feeling between the old settlers and the new comers, leading to violent contests and causing in many instances great loss of property and life. The new comers being the more numerous, claimed to control the government of the country, and endeavored to compel the old settlers to submit to their rule. The old settlers had an organization of their own, and complained that the new comers occupied their lands and overthrew their organization. And among the new comers also there was a bitterness between those who had favored the treaty of removal from the east side of the Mississippi and those who had opposed it. The former sided with the old settlers, but the latter outnumbered both. Violent measures were resorted to on both sides to carry out their purposes, and there was little security for person or property. The situation became intolerable; and in 1845 the contending factions—the old settlers, the treaty party, and the anti-treaty party—sent delegates to Washington to lay their grievances before the officials of the United States Government, in the hope that some relief might be afforded them. The old settlers and the treaty party desired the division of the people into two nations and a division of the territory. Demands also were made by each party against the United States under the stipulations of the treaty of New Echota. These circumstances led to the treaty of August 6, 1846. It was negotiated on the part of the Cherokees by delegates appointed by the regularly constituted authorities of the Cherokee Nation, and by delegates appointed by and representing that portion of the tribe known and recognized as Western Cherokees or the Old Settlers. It recited that serious difficulties had for a considerable time existed between the different parties of the people constituting and recognized as the Cherokee Nation of Indians, which it was desirable should be speedily settled, so that peace and harmony might be restored among them; and that certain claims existed on the part of the Cherokee Na-



tion and portions of the Cherokee people against the United States; and that, with a view to the final and amicable settlement of these difficulties and claims, the parties had agreed to the treaty. (9 Stat. at L., 871.)

"It declared that all difficulties and differences existing between the several parties of the Cherokee Nation were settled and adjusted; and that they should, as far as possible, be forgotten and forever buried in oblivion; that all party distinctions should cease, except so far as they might be necessary to carry the treaty into effect; that a general amnesty should be proclaimed; and that all offenses and crimes committed by a citizen or citizens of the Cherokee Nation against the Nation or an individual were pardoned. It was agreed also that all parties were to unite to enforce laws against future offenders, and that laws should be passed for equal protection and for security of life, liberty and property. Thus the personal dissensions were to a great extent healed.

"The treaty also declared that the lands occupied by the Cherokee Nation should be secured to the whole Cherokee people for their common use and benefit, and that a patent should be issued for the same, including the 800,000 acres purchased, together with an outlet west; thus recognizing that all the lands ceded by the United States for the benefit of the Cherokees west of the Mississippi belonged to the entire Nation, and not to any of the factions into which the Nation was divided. The treaty also made provision for the adjustment and payment of the claims of different parties. The ninth article is as follows:

"The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of the 29th of December, 1835, which said settlement shall exhibit all money properly expended under said treaty; shall embrace all sums paid for improvements, ferries, spoliation, removal and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said Nation, and several sums provided in the several articles of the treaty to be invested as the general funds of the Nation; also

all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of the said several sums shall be deducted from the sum of \$6,647,067; and the balance thus found to be due shall be paid over per capita in equal amounts to all those individuals, heads of families or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

"By the treaty of July 19, 1866 (14 Stat. at L., 797), provision was made for the settlement of friendly Indians on certain unoccupied lands of the Cherokees west of the Mississippi; and for the sale of their interests, and also for the sale of other lands belonging to them in the State of Kansas, and the investment of the proceeds in registered stocks of the United States for the benefit of the Cherokee Nation. Under it, and pursuant to other laws, sales were made of the lands mentioned, and also other lands west of the Mississippi ceded to the Cherokees under the different treaties, to which we have referred, and the proceeds have been invested, as required by article 23 of the treaty. The investment constitutes one of the funds of which the petitioners seek a proportionate part \* \* \*"

Chief Justice Richardson, in his opinion in the Court of Claims, also recites at length the history of negotiations and treaties with the Indians which led up to and formed the basis of the case. It will be seen by careful examination of the foregoing treaty stipulations, that the Indians who constituted the Eastern Band of Cherokees separated themselves from the Cherokee Nation proper. This separation was provided for in article 12 of the treaty of 1835, which was concluded at New Echota. The article is as follows:

"ARTICLE 12. Those individuals and families of the Cherokee Nation that are averse to a removal to a Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and their

property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and per capita as soon as an appropriation is made for this treaty."

The condition of the Eastern Band and the political status are thus described in the opinion in the Court of Claims by Chief Justice Richardson :

"The fact that those who remain were Cherokee Indians by blood and race could not be blotted out, and they were so called, but their connection with the Cherokee Nation was completely severed.

"They had no further voice in its councils nor in its affairs. They were not subject to its laws, and they owed to it no allegiance. The Cherokee Nation, as a body politic, never afterwards recognized them as a part of the Nation in any form or manner whatever. The only privilege ever accorded them by the Nation was that they might become citizens and subjects upon removal within its territorial boundaries, and they accord that to all those who are Cherokees by blood or race, wherever they may come from.

"They had expatriated themselves from the Cherokee Nation, and had become denizens and subjects, if not citizens, of the States where they resided. Thomas, their agent and attorney, wrote that by the constitution and laws of the State they had the right to vote, though they seldom exercised it, lest by identifying themselves with one political party they should give offense to the other. (Ex. Doc. No. 298, 1st session, 29th Congress, p. 181.) Whatever organizations they subsequently effected must have been mere social organizations, with no power as an independent nation of their own to make laws or to do other national acts. That follows from their relations to the State of North Carolina.

"They were never afterwards recognized by the United States as any part of the Cherokee Nation as a body politic."

Congress has passed acts from time to time by which

there was paid to every Cherokee Indian in the Eastern Band his proportion of the per-capita money, and Congress has funded an amount of money equal to the removal and subsistence allowance of each of said Indians and paid the interest to them regularly, and the principal sum of \$53.50 to each one who subsequently went west, until 1852.

Chief Justice Richardson, in his opinion, page 478, says:

"The claimant relies much upon the language of the first article of the treaty of 1846, securing the lands west to the 'whole Cherokee people, for their common use and benefit,' as giving the North Carolina Cherokees and the claimant band an interest therein whenever any part should be sold. Even independently of the contemporaneous construction by all parties, which strengthen our views, we have no doubt that the 'whole Cherokee people' there referred to were the three parties into which the Cherokee Nation was then divided by dissensions, and not by locality—*First*, the 'Eastern Cherokees,' meaning those who removed west after the treaty of 1835–1836, and who constituted the governing party, or, as their delegates signed themselves, the 'Government Party'; *second*, the 'Treaty Party,' and, *third*, the 'Old Settlers,' all mentioned in that treaty.

"If, however, the whole 'Cherokee People' there mentioned included the North Carolina Cherokees, the very language repels the idea of any partition between them. To enjoy the benefit of the common lands they must go and enjoy the same with their brethren, according to the customs, laws, and usages of the Nation. There is not a single word in either of the treaties that implies a partition of lands or a division of the funds of the Cherokee Nation. All is distinctly either declared or implied to be 'in common.' In clear violation of the idea of common property, the present claimant is seeking a division of it."

The concluding portion of the decision of the Court of Claims is as follows:

"The demands of the present Eastern Band of Chero-

kees and its members are in conflict with these express provisions of the constitution and laws of the Cherokee Nation, to which they are claiming to belong. They are demanding a division of trust funds which the United States holds as the common property, and that, too, while they are living without the limits of the Nation, and are, to all intents and purposes, citizens of another government, in utter disregard to the traditions, constitution, and laws of the Cherokee people.

"Throughout this opinion we have treated the proceeds of the sale of the common lands as the common property of the Nation precisely as were the lands before such sale. Those proceeds have been invested and the income of the investments is paid out in accordance with the terms of the treaty of 1866 (14 Stat. at L., 805), for the benefit of the Cherokee Nation as a body politic.

"If the Indians east of the Mississippi River wish to enjoy the common benefits of the common property of the Nation in whatever form it may be, whether in permanent fund or in the proceeds of the sale of common lands, they must comply with the constitution and laws and become readmitted to citizenship as therein provided. They can not have a divided share of the common property of the Nation and thus gain rights and privileges not accorded to any other Cherokee Indians—the living out of the national territory, avoiding subjecting themselves to the laws of the Nation, dividing its common funds and common property, and managing their affairs wholly independent of national authority. Such an admission of right might break the nation into innumerable bands and scatter into fractions funds which, by treaties with the United States, and by the constitution and laws of the Indians themselves, have been dedicated as common funds to the common and not divided benefit of the Nation.

"In our opinion the Eastern Band of Cherokee Indians, claimants in this case, have no rights in law or in equity in and to the moneys, stocks and bonds held by the United States in trust for the Cherokees, arising out of the sales of lands lying west of the Mississippi River, nor in and to a certain other fund, commonly called the permanent annuity fund, mentioned in the act of

March 3, 1883 (22 Stat. at L., 585), referring the case to this court; and a decree will be entered to that effect."

The opinion of the Supreme Court of the United States in this case concludes as follows :

" Their claim (Eastern Band of Cherokees), however, rest upon no solid foundation. The lands from the sales of which the proceeds were derived belong to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest in common that he could claim a pro-rata share of the proceeds of the sales made of any part of them. He had a right to use parcels of the land thus held by the Nation, subject to such rules as its governing authority might prescribe ; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our Government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members. Such was substantially the language and such the decision of the Attorney General of the United States in a communication made to the President, in 1845, with reference to the treaty of New Echota. ' The Executive of the United States,' he said, ' must therefore regard the treaty of New Echota as binding on the whole Cherokee Tribe ; and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina, are bound by its provisions. As a necessary consequence, they are entitled to its advantages. The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the treaty on them and their rights. They can not take its benefits without submitting to its burdens. The Executive must regard the treaty as the supreme law, and as a law construe its provisions.' (4 Ops. Attorney-Gen., 437.)

"Whatever rights, therefore, the Cherokees in North Carolina who refuse to join their countrymen in the removal to the lands ceded to them west of the Mississippi, can claim in the funds arising from the sales of portions of such lands, are in the fund created by a commutation of the annuities granted upon cessions of the lands of the Cherokee Nation must depend entirely upon the treaties out of which those funds originated. They have as yet received nothing from either of them, and they can claim nothing by virtue of the fact that the lands of the Nation, which its authorities ceded to the United States, were held for the common benefit of all the Cherokees. All public property of the Nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.

"The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. As well observed by the Court of Claims in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a nation in whole or in part. (20 Ct. Cl.)

"Nor is the band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west and preferred to remain and become citizens of the States in which they resided were promised certain moneys; but there is no evidence that the petitioners have succeeded to any of their rights. The original claimants have probably all died, for fifty years



have elapsed since the treaty of 1835 was made, and no transfer from them or their legal representatives is shown. But assuming that the petitioners probably represent all rightful demands of the Cherokees living in North Carolina when the treaty was made, what were those demands? As designated by articles 12 and 15 of the treaty, these Cherokees were to receive 'their due portion of all the personal benefits accruing under the treaty for their claims, improvements, and per capita.' The term 'claims' had reference to demands for spoliations of their property which existed prior to the treaty. The improvements were those made on the property ceded. By per capita was meant the proportionate amount, given to each Cherokee east not choosing to emigrate, of the money received on the cession of the lands east of the Mississippi after deducting certain expenditures mentioned in article 15. Whatever may have remained for the per capita distribution of the \$5,000,000 received for the lands after the deduction mentioned, it is plain that it constituted no portion of the moneys that formed the fund of which the petitioners seek by this suit a proportionate part. By the treaty of 1846 certain sums were allowed in addition to the \$5,000,000 specified in the treaty of 1835, and from the whole amount certain items other than those three designated were to be deducted, and the balance was to be paid over per capita in equal amounts to all the individuals, heads of families, or their legal representatives entitled to receive it under that treaty. But this change in no respect affects the case.

"While the treaty of 1846 was under negotiations, one William H. Thomas appeared in Washington as the representative of Cherokees in North Carolina and urged a recognition of their demands for the per capita money and the removal and subsistence money under articles 8 and 12 of the treaty of 1835. He had obtained a statement from one of the commissioners who negotiated that treaty on the part of the United States, from several respectable persons who were privy to the negotiations, and from some of the Cherokees who signed the treaty, as to the meaning which should be given to certain terms used in it; and we are referred to these documents as though they should have some influence upon the

construction of those terms. But it is too plain for controversy that they can not be used to control the language of the treaty or guide in its construction.

"The per capita money and the removal and subsistence money had not been paid when the treaty of 1846 was made, but the Court of Claims finds that since then they have been paid. The claim now presented by the Cherokees of North Carolina to a share of the commuted annuity fund of \$214,000, and of the fund created by the sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designations in the treaty of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as 'the common property of the Nation,' or as held for the common use and benefit of the Cherokee people, has no substantial foundation. If Indians in that State, or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship, as there provided. They can not live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States for the benefit of the United Nation, and not in any respect for those who have separated from it and become aliens to their Nation.

"We see no just ground on which the claim of the petitioners can rest to share in either of the funds held by the United States in trust for the Cherokee Nation, and the decree of the Court of Claims must, therefore, be affirmed; and it is so ordered."

We have quoted thus extensively from this important case for the reason that the historical review given in the opinions in this case, and the legal principles involved, are of the utmost importance in determining the rights of many persons to citizenship in the Cherokee Nation

at this time. In some of the briefs of attorneys for claimants, it is contended that the opinion of the Supreme Court and the Court of Claims in the case of the Eastern Band of Cherokees are mere dicta, and not applicable to the cases now pending in this court. It will be seen, however, in the further consideration of the cases now pending, that the opinion in the case of the Eastern Band of Cherokees are very important and controlling upon many features which may be presented.

It is true that the parties now applying for citizenship in the Cherokee Nation were not all parties to the treaty concluded at New Echota, and were not interested in the suit decided by the Court of Claims and affirmed by the Supreme Court. But many of the applicants for citizenship now before this court claim to be the descendants of the North Carolina, or Eastern Band, of Cherokee Indians, and in so far as the rights of the Indians belonging to that band were determined by the Supreme Court, the decision would be applicable and decisive as to all claiming through them.

### **Legal Propositions Established.**

In the opinion of this court the following propositions are clearly established by the decision of the Supreme Court of the United States and the United States Court of Claims in the case of the Eastern Band of Cherokees against the Cherokee Nation and the United States, viz.:

FIRST. That the lands and other property of the Cherokee Nation belong to it as a political body, and not to the individual members. The lands are held as communal property, not vested in the Cherokees as individuals, either as tenants in common or joint tenants. (See, also, opinion by Chief Justice Fuller of the Supreme Court in the case of *The United States against The Old Settlers*, 148 U. S., 427.)

SECOND. That the North Carolina Cherokees, who are now known as the Eastern Band, who refused to join their countrymen in the removal to the land ceded to the Cherokee Nation west of the Mississippi river, thereby dissolved their connection with what is now known as

the Cherokee Nation. They became citizens of the States and subject to the laws of the States in which they resided, and have no right, title, or interest in the lands or other property of the Cherokee Nation as now constituted. They have received their due proportion of all the personal benefits accruing under the treaty of 1835-'36 for their claims, improvements, and per capita. Since their separation from the Cherokee Nation they have had no right to any portion of the lands or common property of the Nation, or to any lands or property held for the common use and benefit of the Cherokee people who constitute said Nation.

THIRD. That the phrase, "the whole Cherokee people," used in the treaty of 1846, refers to those Cherokees only whose representatives participated in the making and ratification of the treaty, viz., the Cherokee Nation proper, the treaty party, and the Old Settlers or Western Cherokees. Those Cherokees only were the recognized citizens of the united Cherokee Nation, and no other Cherokees were entitled to the rights and privileges of citizens of the Cherokee Nation as now constituted.

FOURTH. If the Eastern Band of Cherokees, or the Cherokees in all the States of the Union, wish to enjoy the benefits of the common property of the Cherokee Nation in whatever form it may exist, they must, as held by the Supreme Court and by the Court of Claims, comply with the constitution and laws of the Cherokee Nation, and be readmitted to citizenship as therein provided. They can not live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the land, funds, and common property of the Nation. These lands, funds, and property were dedicated by the Cherokee constitution, and were intended by the treaties with the United States, for the use and benefit of the united nation, and not in any respect for the use and benefit of those who have separated themselves from it and become aliens to the Nation.

### **The Land Tenure.**

The constitution of the Cherokee Nation, article 1,

section 2, provides that the lands of the Cherokee Nation shall remain common property, but the improvements made thereon, and in possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may be rightfully in possession of them. The patent of the United States to the Cherokee Nation, issued on the 31st day of December 1838, provides as follows :

"Therefore in the execution of the agreements and stipulations contained in the said several treaties, the United States has given and granted, unto the said Cherokee Nation the two tracts of land so surveyed, and herein before described, containing in the whole 14,374,135 and 14-100 of an acre, to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plains of the western prairie, referred to in the second article of the treaty of the 29th of December, 1835," &c.

And subject, among other things, to the further condition "That the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandoned the same."

It will be seen from the text of the patent by which the Cherokee Nation holds the lands belonging to it, that the title is in fee simple with certain conditions, called a base or qualified fee. The citizens who occupy the lands of the Cherokee Nation have no title to the soil, but merely a right to occupy such portions of the soil as they may cultivate, under the laws of the Nation. The citizen occupant, not having any title to the land but owning the improvements only, can not be said to be either a tenant in common or a joint tenant with any other citizen of the Nation, because the tenure implies title of some kind in the tenant. Tenants in common have a unity of possession, because no man can tell which part is his own. (Browne's Blackstone's Commentaries, page 263.)

Hence the possession of one citizen of a portion of the land of the Nation is in no sense a tenancy in common.

Nor are the citizens of the Nation joint tenants, for joint tenants of land hold in fee simple or otherwise, and there must be a unity of interest, a unity of title, a unity of time, and a unity of possession. In other words, the joint tenants have one and the same interest secured by one and the same conveyance, commencing at one and the same time and held as one individual possession. (*Ib.*, 256.)

These definitions, therefore, do not apply to any condition existing in the Cherokee Nation as to land tenure and occupancy. A citizen of the Cherokee Nation has the exclusive right to the occupancy of the land upon which he has made improvements, or of which he is rightfully in possession. No other citizen of the Nation has any right to occupy the particular tract occupied by another citizen; therefore, the citizens of the Nation are neither joint tenants with other citizens of the Nation or tenants in common. They occupy the lands in severalty—each holding the possession in his own right only, without any other person being joined or connected with him in point of interest during his occupancy. They are merely occupants in severalty.

### **The United Nation.**

The Indians who by the treaty of 1835 agreed with the United States to emigrate west of the Mississippi River were finally located in what is now known as the Cherokee Nation. The Western Cherokees, known as the Old Settlers, had preceded them to this country. A new Nation was formed to consist of the Eastern and Western Cherokees. This act of union between the Eastern and Western Cherokees was agreed to on the 12th of July, 1838. In September following, as heretofore set forth in the opinion of the Supreme Court, a constitution of government was adopted in which it was recited that the Eastern and Western Cherokees had become united in one body politic under the style and title of the Cherokee Nation. Notwithstanding the formation of this union and the establishment of a new constitution and a new Nation, all was not peace and harmony. Dissension arose which led to the formation of the treaty

of 1846. This treaty was made and concluded between the following parties :

FIRST. The United States.

SECOND. The Cherokee Nation.

THIRD. The Treaty Party, which was a faction of the Cherokee tribe of Indians at that time.

FOURTH. By the Old Settlers or Western Cherokees.

This treaty recites the fact that serious difficulties for a considerable time past had existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it was desired should be speedily settled, so that peace and harmony might be restored among them. With a view to final and amicable settlement of these difficulties, that treaty was agreed to.

The first article provides, among other things, that "the lands now occupied by the Cherokee Nation shall be secured to the whole people for their common use and benefit."

The words, "the whole Cherokee people," mentioned in this article evidently refer to the parties who participated in the formation of the treaty, and, as Chief Justice Richardson held in his opinion, to which reference is made, these words did not embrace what is known as the Eastern Band of Cherokees, nor do they embrace the Cherokees who had separated themselves from the tribe and taken up their residence in the States.

### **Three Classes of Cherokees.**

From these treaties and from provisions in the Cherokee constitutions it will be seen that there were, and have been since the establishment of the present Cherokee Nation west of the Mississippi River, three classes of Cherokee Indians.

FIRST. Those who were citizens of the United Cherokee Nation, the Nation as now constituted, and which occupies the lands ceded to the Nation west of the Mississippi River ;



SECOND. The Eastern Band of Cherokees, which constitutes all those individuals and families of the old Cherokee Nation who were adverse to the removal to the Cherokee country west of the Mississippi River, and who were desirous to become citizens of the States in which they lived, and where they then resided; and

THIRD. Those Cherokees, mentioned in the constitution of the United Cherokee Nation, and also in the constitution of the old Cherokee Nation, who were described as follows: "Citizens who shall remove with their effects out of the limits of this Nation and become citizens of another government." Such Indians were declared by the Cherokee constitution to have forfeited all their rights and privileges as citizens of the Nation. It was provided, however, with reference to this latter or third class, "that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation, on their memorializing the national council for such readmission."

Those who are now claiming the right to be enrolled as citizens of the Cherokee Nation come within one or the other of the last two classes mentioned.

### **Who may be Admitted to Citizenship.**

This court has no jurisdiction or power under the acts of Congress by means of which the pending cases are being considered to exercise any discretion as to who should or who should not be enrolled as citizens of the Cherokee Nation. It has the power simply to determine who are legally citizens thereof, and who ought to be so regarded, but who are now denied the rights and privileges of citizenship by said Nation. The law of Congress conferring jurisdiction on this court to consider these cases provides that the United States commission "shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes."

While no rule of decision is laid down in the act of

Congress for this court, it will be assumed that the same provisions of law apply to this court that were made applicable to the United States commission. The direction is to "respect" all laws of the several nations. What is meant by the word "respect," as used in this connection? There can be but one meaning, and that is that the court and the United States commission should give effect to all such laws. The next phrase in the statute is as follows: "And all treaties with either of said nations or tribes." The word "respect," therefore, applies equally to the treaties as to the laws. The next phrase is as follows: "And shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes."

This court must, therefore, respect or give effect to all laws of the several nations not inconsistent with the laws of the United States, and must give effect to all treaties with either of said nations, and must give due force and effect to the rolls, usages, and customs of each of said nations or tribes. In this last provision Congress has recognized the fact that the Cherokee Nation has a right to determine who shall be and who shall not be citizens of the Nation. The national council may, in its discretion, confer citizenship upon any person, or it may establish courts or commissions to hear and determine applications for citizenship in the Nation. In determining, therefore, who among those now claiming citizenship should be enrolled as citizens of the Cherokee Nation, this court will look to the laws of the Nation and consider whether those laws are in conflict with the laws of the United States. It will also ascertain who have been lawfully adjudged to be citizens by tribunals or commissions duly authorized to pass upon their applications. And it will consider the treaties that have been made between the United States and the Nation, and it will give due force and effect to the rolls, usages, and customs of the Nation in dealing with citizenship cases.

In order to determine what is the law of the Cherokee Nation, the same rules of construction must be applied as would be applied to the laws of Congress or of any State in this Union. If the law should be found to be in conflict with the constitution of the Cherokee Nation it would be null and void, just as the law of Congress

in conflict with the Constitution of the United States would be null and void.

In considering the treaties which have been made between the Nation and the United States, they must be carried into effect and the true intent and meaning of them must govern. If it should appear that any of the treaties had been abrogated by Congress such treaties would no longer be in force.

In order to give due force and effect to the rolls, usages, and customs of the Nation this court will inquire into such rolls, usages, and customs. Congress has already defined what is meant in the act of June 10, 1896, by the words "rolls of citizenship." The rolls of citizenship as defined by Congress have been confirmed. The amendment act which is found in the Indian appropriation bill passed June 7, 1897, is as follows :

*" Provided That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the Nation, and the descendants of those appearing on such roll, and such additional names and their descendants as have been subsequently added, either by the council of such Nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such Nation: *Provided, also, That any one whose name shall be stricken from the roll by**

such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six."

This provision of course will take effect from the date of its passage, and this court will give such construction to the words "rolls of citizenship," used in the act of June 10th, 1896, as is provided for in this amendment.

It is competent for Congress by subsequent acts to declare the meaning which should be given to acts previously passed, and this court will carry into effect the meaning which Congress subsequently provided should be given.

### **Summary of Citizenship Acts.**

The Cherokee Nation has from time to time passed laws for the purpose of ascertaining who were entitled to citizenship in the Nation. It is contended by counsel for the Cherokee Nation that some of the acts of the Cherokee council, in reference to citizenship, are in conflict with the constitution of the Nation. None of these citizenship acts, so far as this court is advised, have been declared unconstitutional by the courts of the Cherokee Nation. They have been recognized as binding upon that Nation. The constitution of the Nation, section 14, article 2, reads as follows: "The national council shall have power to make all laws and regulations which they shall deem proper for the good of the Nation which shall not be contrary to the constitution."

Congress has always conceded to the Nation the right to enact all laws which are not in conflict with the Constitution or laws of the United States, or with the treaties made with the Nation.

The following tribunals and commissions have been created by the acts of the Cherokee council for the purpose of considering citizenship cases:

**FIRST.** The Supreme Court of the Nation was authorized by an act of December 3, 1869, to consider the claims of all persons whose citizenship was doubtful.

Such persons were required to appear before the Supreme Court on the first Monday of December, 1870, to establish their right. The decision of the court was made final and conclusive.

**SECOND.** By an act of council November 18, 1878, North Carolina Cherokees were authorized to enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival and make satisfactory showing of being Cherokees. This act was in force one year and twenty days. During this time the Chief Justice was authorized to place on the rolls such of those Cherokees as he should find entitled to citizenship. By act of December 7, 1871, the act was amended so as to limit the power of the Chief Justice to merely receive and hear petitions of all persons claiming the rights of Cherokee citizenship, and to transmit all evidence to the national council at each regular session for final action. This act was repealed December 5, 1876, and was in force five years.

**THIRD.** By act of the council December 5, 1877, a commission on citizenship was created, which was authorized to take cognizance of and exercise complete jurisdiction over all cases arising under the constitution and laws of the Cherokee Nation involving the right of citizenship in said Nation as specified in said act. By act of December 5, 1878, the act authorizing this commission was amended so as to extend its jurisdiction to the cases of all claimants to the rights of citizenship who may be at the time of the passage of the act actually residing within the limits of the Nation, and whose cases have not been determined adversely to the claimants by the commission. The commission expired by limitation of law on the 30th day of June, 1879, and was in force one year and six months.

**FOURTH.** By act of council of November 20, 1879, another commission was created to have cognizance of all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship as therein specified. This act was repealed November 26, 1884, and was in effect five years.

FIFTH. By act of the council December 8, 1886, a third commission was created. This commission was authorized to hear all persons applying for citizenship in the Cherokee Nation upon the ground of Cherokee blood or descent, but such applicants must be of the lineal descent of persons whose names appear upon the census rolls taken by the United States after the treaty of 1835, and roll of 1848, known as the Mulla rolls, and the roll known as the Sila roll, and the census rolls taken by the United States in 1852, known as the Chapman rolls.

The commission was required to decide these cases in accordance with the constitution of the Cherokee Nation, conferring upon the national council the power to readmit persons to citizenship, and with the decision of the Supreme Court of the United States in the case of the Eastern Band of Cherokees against the Cherokee Nation. This jurisdiction embraced all classes of Cherokees by blood, except the Old Settlers, who were provided for by an amendment of the council passed May 23, 1887. This commission expired on the second Monday of November, 1889, and was in existence three years.

Numerous other acts in reference to citizenship were from time to time passed by the national council.

By an act of council October 12, 1846, the time within which persons might appear before the council was extended until November, 1846. On October 15, 1841, the Cherokee council passed the following act:

An act relating to persons returning to the Nation.

*"Be it enacted by the National Council, That all Cherokees, and other persons having Cherokee privileges, who may have been residing out of the limits of the Nation previously to the adoption of the constitution, are hereby exempted from being required to memorilize the the national council for admission to the rights and privileges of citizenship; it is considered that they have the right of returning without the action of the council."*

*"TAHLEQUAH, October 15th, 1841."*

By act of council November 20, 1868, the foregoing act was repealed, the repeal act being as follows:

"An act repealing an act authorizing persons to move into the Cherokee Nation, &c.

*"Be it enacted by the National Council, That the act passed on the 15th of October, 1841, authorizing certain classes of persons to move into the Cherokee Nation without memorializing the national council be, and the same is hereby, repealed.*

*"Approved November 20th, 1868."*

The following provision will be found in the Cherokee constitution of 1839, viz.:

"The descendants of Cherokee men by all free women except of the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust, under this government."

The following amendment thereto was adopted in 1866, and is now in force:

"SEC. 5. \* \* \* All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen men who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants *who reside within the limits of the Cherokee Nation*, shall be taken and deemed to be citizens of the Cherokee Nation."

It will thus be seen that from October 15, 1841, until November 20th, 1868, a period of twenty-seven years, a general invitation was extended by the Cherokee Nation to all Cherokees who may have been residing out of the



limits of the Nation previous to the adoption of the constitution to return to the Nation and enjoy the rights and privileges of citizenship without being required to memorialize the national council for admission.

### Text of Citizenship Acts.

In view of the fact the jurisdiction of the tribunals, which have been created to pass upon its citizenship cases in the Cherokee Nation, has been called in question, in some cases, the text of the acts creating such tribunals will be set forth in full in this opinion. The act conferring jurisdiction upon the Supreme court is as follows:

"That all persons whose rights to citizenship in the Cherokee Nation shall be called in question and who shall be reported by the persons authorized by this act to take a census of the *Cherokee people*, or list of doubtful persons, shall be required to appear before the Supreme Court of the Cherokee Nation, at Tahlequah, on the first Monday in December, 1870, then and there to establish their right to citizenship in the Nation, and the said Supreme Court is hereby specially empowered to act as a court of commissioners on behalf of the Nation, for the hearing and determination of all cases of doubtful citizenship which shall be reported to them by the census takers, or by the solicitors of the several districts. And the decision of the said court shall be deemed final and conclusive in the premises as to the rights of said persons to citizenship in the Cherokee Nation. And the said court shall cause a correct list of the names and ages of all persons whose rights they may confirm; and one of all those whose rights they may reject, to be placed on record in their office, and a copy of the same to be furnished to the Principal Chief for the use of the Executive Department.

"Approved December 3, 1869, the date of presentation."

Counsel for the Cherokee Nation contend that by this act the Supreme Court was not empowered to readmit

persons to citizenship in the Cherokee Nation, and claiming to be citizens were in fact such, and that, if such court went outside of this and admitted persons to citizenship who had come from the adjoining States and had at no time been citizens of the Nation, it exceeded its jurisdiction. This court does not agree with this contention. The authority conferred upon the Supreme Court was to hear and determine the cases of all persons whose rights to citizenship in the Cherokee Nation should be called in question, and who would be reported to the court by the census takers; or, as expressed in another part of the act, "to hear and determine all cases of doubtful citizenship which shall be reported to them by the census takers." The decision of the court, as will be seen, was made final and conclusive in the premises as to the rights of such persons to citizenship in the Cherokee Nation.

The act conferring jurisdiction upon the Chief Justice of the Supreme Court is as follows:

"Whereas, The national council, under a joint resolution approved December 10, 1869, entitled 'A joint resolution of the national council in regard to the *North Carolina Cherokees*,' has invited the said North Carolina Cherokees to emigrate west, and become identified with the Cherokee Nation as citizens thereof; therefore,

*Be it enacted by the National Council*, That all such Cherokees as may hereafter remove into the Cherokee Nation and permanently locate therein as citizens thereof shall be deemed as Cherokee citizens: *Provided*, Said Cherokees shall enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival in the Cherokee Nation, and make satisfactory showing to him of their being Cherokees. And the said Chief Justice is hereby required to report the number, names, ages, and sex of all persons admitted by him to be entitled to Cherokee citizenship; and also the number, names, ages, and sex of the persons denied the right of citizenship, to the annual session of the national council in each year.

"Approved.

"TAHLEQUAH, C. N., November 18, 1870.

The joint resolution to which reference is made is as follows:

"Joint resolution of the National Council in regard to North Carolina Cherokees.

"Whereas, Sundry petitions have been transmitted to the national council, by the North Carolina Cherokees, from which it appears that the said Cherokees (or a portion of them) are desirous of removing and becoming members of the Cherokee Nation;

"And whereas, The Principal Chief has transmitted a communication to the national council enclosing one from the Commissioner of Indian Affairs, from which it appears that the Honorable Commissioner desires to know of the wishes of the Cherokee Nation in reference to the removal of the said North Carolina Indians; therefore

*"Be it resolved by the National Council,* That the Principal Chief be, and he is hereby, authorized to inform the Honorable Commissioner of Indian Affairs of the willingness of the Cherokee Nation to receive the said 'North Carolina Cherokees' into the Cherokee Nation, provided that they remove without any expense to the treasurer of the Cherokee Nation. *And provided further,* That these resolutions shall not be so construed as to admit any Cherokee rights or benefits until they shall have removed west and been identified as citizens of the Cherokee Nation.

*"Be it further resolved,* That the Principal Chief be, and he is hereby, authorized to notify the said 'North Carolina Cherokees' of the willingness of the Cherokee Nation to receive them as citizens of the Cherokee Nation, upon the terms herein before expressed.

TAHLEQUAH, C. N., 10, 1869."

This court has endeavored to secure a copy of the letter of the Commissioner of Indian Affairs, referred to in this act, but has been unable so far to do so. It appears, however, from the two acts mentioned, that they relate to what is known as the North Carolina Cherokees, those Cherokees who are denominated "The Eastern Band of Cherokees" in the decision of the

Supreme Court, reported in 117 United States Reports, p. 288.

All such Cherokees who might thereafter remove into the Cherokee Nation and permanently locate therein as citizens thereof were declared to be Cherokee citizens, provided they should enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival in the Cherokee Nation, and make satisfactory showing to him of their being Cherokees.

It is the opinion of this court that no jurisdiction was conferred upon the Chief Justice of the Supreme Court of the Cherokee Nation, except to enroll North Carolina Cherokees, and if it should appear that he enrolled Cherokees not within this designation, he would be acting without jurisdiction.

The jurisdiction conferred upon the Chief Justice by the act of December 7, 1871, was merely to take evidence with regard to persons applying for citizenship, and transmit the petitions to the council for its final action. The act is not deemed important in this connection, and it will not be quoted. The power of the council to admit persons to citizenship has never been questioned. It is, however, of interest, in order to determine the construction to be given to the act conferring jurisdiction upon the Chief Justice, to refer to a portion of the text of the amendatory act. The amendatory act recites that the act relative to the North Carolina Cherokees, approved November 17, 1870, "is hereby so amended as to require the Chief Justice of the Cherokee Nation to receive and hear the petitions of all persons claiming the right to Cherokee citizenship."

Attention is called to the person covered by each act. By the first act, North Carolina Cherokees are mentioned. By the second act, all persons claiming the rights to Cherokee citizenship are referred to, clearly indicating that the two acts had reference to different classes of persons; that the first act had reference to the North Carolina Cherokees only, while the latter or amendatory act had reference to all persons claiming the rights of Cherokee citizenship.

The act creating the first commission on citizenship, passed December 5, 1877, is as follows:

"The Commission on Citizenship shall have cognizance of, and exercise complete jurisdiction over, all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship of said Nation as hereinafter specified:

"1st. Of all cases wherein claimants to citizenship have applied to the Supreme Court or the national council, and wherein the court or council have failed to adjudicate the same, whether it originated in the national council or was transmitted thereto for review from the Supreme Court.

"2d. Of all cases where the national council has adjudicated the same by a decision adverse to claimants, and where such rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States subsequent to the date of the Cherokee treaty of July 10, 1866, and whose cases have been reported by the United States Agent under instruction from the Department of the Interior to the Principal Chief, and are now on file in this office.

"3d. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

"4th. Of all cases where the citizenship has been granted and there is presumptive evidence of fraud having been perpetrated to secure the same; or where citizens of the United States have married into this Nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

"5th. Of all cases of persons of African descent arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the requirements of the treaty, but has failed to receive recognition as a citizen by competent authority.

"In decreeing the right of citizenship in the Cherokee Nation the commission shall be governed by the provisions contained in the fifth section, amendments to article third of the constitution, to wit: 'All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation; and in addition thereto shall include all applicants *bona-fide* residents and who are of Cherokee parentage, and who may be of not less than the half-blood. The recognition of the rights of citizenship in the Cherokee Nation, by virtue of the foregoing provisions, shall not be deemed as conferring the like right upon any persons not an Indian who may be connected to such person by blood or affinity, unless such person shall comply with the provisions of article 15, chapter 10, New Code, relating to intermarriages.

"The Commissioners on Citizenship may admit as evidence in any of the cases named herein the oral testimony of witnesses under oath, the decision, records, or other papers, or the certified copy thereof in the clerk's office of the national council, or of the Supreme Court of the Cherokee Nation, or by other affidavits taken before any court of record in the United States, duly authenticated, pertaining to any case brought before it under this act, and shall give such weight to the credibility of such evidence in making up their judgment thereon as they may deem it entitled to. They may, in their discretion, limit the number of witnesses that may be introduced to establish the same fact in any one case, and fix the period of hearing and determining the same."

"Approved December 5, 1877."

This act was amended December 5, 1878, as follows:

"Be it enacted by the National Council, That an act approved December 5th, 1877, entitled 'An act creating a

commission on citizenship to try and settle claims to citizenship,' be, and the same is hereby, amended so as to extend the jurisdiction of the Commission on Citizenship to embrace and extend to the cases of all claimants to the rights of citizenship who may at the passage of the act be actually residing within the limits of the Nation, and whose cases have not heretofore been determined adversely to the claimants by the present Commission.

"SEC. 2. *Be it further enacted*, That the Principal Chief be authorized and requested to direct the solicitors of the several districts to report by the 1st day of January, 1879, or as soon thereafter as practicable, to the Commission on Citizenship, the names of all persons who allege that they have claims to Cherokee citizenship and who are now residing within their respective districts.

"SEC. 3. *Be it further enacted*, That the Commission on Citizenship shall expire on the 30th day of June, 1879, and shall then report their proceedings to the Principal Chief, for the information of the national council, and shall turn over to the Executive Department all their records.

"Approved December 5, 1878."

It will be seen that this act embraced all claimants who at the passage of the act actually resided within the limits of the Nation and whose cases had been theretofore determined adversely by said commission.

The act creating a second Commission on Citizenship was passed November 20, 1879, and is as follows :

"They shall also have the right to command the presence and services of the sheriff of Tahlequah District, or his deputy during their sessions; who shall be allowed one dollar per day while attending the sessions of the Commission on Citizenship, separate from his salary. The said sheriff shall have authority to send summons to the several sheriffs of the several districts, to be served without delay by them and returned, without any other compensation than that of their salary.

"The Commission on Citizenship shall have cognizance of and exercise complete jurisdiction over all cases arising under the constitution and laws of the Cherokee



Nation involving the right to citizenship of said Nation as hereinafter specified.

"1st. Wherein a claimant to citizenship has applied to the late Commission on Citizenship and no final action taken, or to the national council since the expiration of the Commission on Citizenship, or where application for citizenship may be made to the national council prior to the first meeting of the Commission on Citizenship herein created.

"2d. Of all cases where the national council has adjudicated the same by a decision adverse to the claimant, and where such rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States, subsequent to the date of the Cherokee treaty of July 19, 1866, and whose cases have been reported by the United States Agent under instructions from the Department of the Interior to the Principal Chief, and are now on file in this office, and which had not been investigated and final decision given by the late Commission on Citizenship.

"3d. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

"4th. Of all cases where citizens of the United States have married into this Nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

"6th. Of all cases of claimants petitioning for citizenship not embraced in the foregoing classification of claimants.

"7th. Of all the cases of African descent arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the treaty but has failed to receive recognition as a citizen by competent authority, and who have not had decisions adverse to them by competent authority.

"In decreeing the right to citizenship in the Cherokee Nation the commission shall be governed by the provi-

sions contained in the 5th section, amendments to article 3 of the constitution. The recognition of the right of citizenship in the Cherokee Nation by virtue of the foregoing provision shall not be deemed as conferring the like right upon any person not an Indian who may be connected with such person by blood or affinity, unless such person shall comply with the provisions of article 15, chapter 10th, 'New Revised Code,' relating to inter-marriage."

The third commission, as heretofore stated, was authorized by the council, passed December 8, 1886. The jurisdiction conferred upon it was embraced in section 7 which is as follows:

"SEC. 7. The commission when organized, shall give a hearing to any person applying for citizenship in the Cherokee Nation upon the ground of Cherokee blood or descent, but such applicant must be a person, or the lineal descendant of a person whose name appears upon the census roll of the Cherokees taken by the United States after the treaty of 1835, and known as the rolls of 1835, and the rolls of 1848, known as the 'Mulley Rolls,' and the census rolls of the Cherokees taken by the United States in 1851, and known as the 'Sila Roll,' and the census rolls of the Cherokees taken by the United States in 1852, known as the 'Chapman Rolls' and the commission shall decide in accordance with the constitution of the Cherokee Nation conferring upon the national council the power to readmit persons to citizenship, and with the decision of the Supreme Court of the United States, delivered March 1st, 1885, in the case of the North Carolina Cherokees v. The Cherokee Nation."

This act was amended May 23, 1887, as follows:

"An act to amend an act entitled 'An act for the appointment of a commission to try and determine applicants for Cherokee citizenship.

*Be it enacted by the National Council,* That section seven (7) of an act of the national council approved December 8, 1886, and entitled an act for the providing

for the appointment of a commission to try and determine applications for Cherokee citizenship, shall be so amended that the commission shall be authorized to try and determine all claims to Cherokee citizenship wherein the claimants claim by virtue of Cherokee descent, who left or emigrated from the Cherokee Nation prior to the year 1835."

This amendment conferred jurisdiction to hear and determine the claims of those who emigrated from the Old Cherokee Nation prior to the year 1835. Such persons were known as the Old Settlers or Western Cherokees. As before stated, this commission expired in 1889. Since that time no commission or tribunal of the Cherokee Nation has been authorized to pass upon citizenship cases. All persons admitted to citizenship in the Cherokee Nation since that time have been admitted by act of the Cherokee council. An act of the Cherokee council of December 5, 1888, passed during the existence of this commission, provided that all persons admitted by the commission should become bona-fide residents of the Nation within one year from the date of their admission. The last act of the Cherokee council of general legislation in regard to citizenship is as follows:

*"Be it enacted by the National Council, That all persons that have been or may hereafter be readmitted to citizenship in the Cherokee Nation are hereby required to permanently locate within the limits of the Cherokee Nation within six months from the passage of this act, or from the date of readmission of persons readmitted or no rights whatever shall accrue to such persons by reason of such readmission ;*

*"Provided, That nothing in the act shall bar minors and orphans.*

*"Approved December 4th, 1894."*

#### **Adjudication in Citizenship Cases.**

In all cases wherein it appears that the applicants for citizenship in the Cherokee Nation filed their claims before the proper tribunal or commission, and in all cases where the tribunal or commission acted within the

scope of its jurisdiction, as prescribed by the law of the Cherokee Nation, and admitted such persons to citizenship, this court will regard such cases as adjudicated; and in all cases where such applicants were rejected, the same rule will be applied. In order to set aside such adjudication, whether in favor of or against such applicants, it must be made to appear to this court either that the tribunal or commission acted without jurisdiction, or that the decision of the commission was secured by fraud. A judgment by which the court exercised a power not conferred upon it by the statute under which it assumed to act is a nullity, and will be so treated when it comes in question, either directly or by an appeal or collaterally.

*Allison v. T. A. Snider Preserve Co.* (Sup. Ct., App. Term), 20 Misc., 367; 45 N. Y. Supp., 925.  
*Risley v. Bank*, 83 N. Y., 318.

In order that the adjudication of the tribunal or commission should be set aside for fraud, it must clearly and affirmatively appear that the case was fictitious; that the judgment of the tribunal was procured by the beneficiaries thereof by bribery or other corrupt means, and that the judgment should not in equity and good conscience be regarded as a valid judgment.

Justice requires that every case having been once fairly and impartially tried should be forever closed; the public tranquility demands that all litigations of that kind between those parties should cease. A judgment entitled to this consideration must, however, be the judgment of the tribunal.

"The rule is well settled that a judgment or decree of any court will be set aside in a court of equity if it be made to appear that it was procured by fraud. This rule needs no citation of authorities to support it, because it is too well established and known to need such citation. But the proof of the fraud and the facts evidencing it must be clear and satisfactory to the court before it will act. It will not proceed upon doubtful inferences."

*Davis against Jackson*, 39 S. W. Rep., p. 1076;  
 Sup. Ct. of Tenn., March 13, 1897.

It is not enough to allege and prove that the tribunal erred in his opinion; or that the perjured testimony was introduced and considered, unless such perjured testimony was given by the beneficiaries of the judgment, or by their procurement. (Black on Judgments, vol. 1, sec. 323.) It will be taken for granted that the court or tribunal fairly weighed and considered such testimony and disregarded it. The judgment itself must be corrupt, or procured by corrupt means, or the court must have acted without jurisdiction, in order to render it a nullity.

In all cases where claimants have appeared before tribunals or commissions established by the Cherokee Nation, and have had their cases considered fairly and honestly, this court will not disturb the judgment. The burden of proof will be upon those who allege a fraudulent judgment to prove it. The law presumes not only that the acts of courts, but the transactions of individuals are honest. Those who allege fraud are required to establish it conclusively.

Black on Judgments, vol. 1, sec. 321, and authorities there cited, namely, *Jones v. Britton*, 1 Woods, 667; *Caldwell v. Fifield*, 24 N. J. Law, 150.

In all cases where the tribunal or commission having jurisdiction of the case has passed upon it, the decision will be binding upon this court, unless it clearly appears from the evidence in the case that the judgment is so fraudulent that a court of competent jurisdiction should set it aside and declare it a nullity.

### **Indians Residing in the States.**

Frequent reference has been made in the briefs and arguments of counsel in citizenship cases to the case of *John Elk v. Charles Wilkins*, decided by the Supreme Court of the United States, and reported in 112 U. S. Reports, pp. 94 to 123. The plaintiff in this case brought suit against the defendant, who was one of the registrars of election in the city of Omaha, Nebraska, for refusing to register him as a voter, and for refusing to permit him to

vote at an election in that city in April, 1880. The defendant refused to register and to permit the plaintiff to vote on the ground that he was an Indian, and not a citizen of the United States. In that case the Supreme Court of the United States held as follows:

"An Indian, born a member of one of the Indian tribes within the United States which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized or taxed, or recognized as a citizen, either by the United States or the State, is not a citizen of the United States within the meaning of the first section of the 14th article of the amendment of the Constitution."

It will be seen from this quotation from the syllabus in that case that an Indian who had separated himself from his tribe, but who had not been naturalized or taxed, or recognized as a citizen, either by the United States or State, is not a citizen of the United States. The court, further on in its opinion in this case, held as follows:

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as choose to remain behind on the removal of the tribe westward, to be citizens, or authorized individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws."

Reference is had, it will be seen from these quotations from the decision of the Supreme Court, to the treaties with the Cherokees in 1817 and 1835. The treaty with the Cherokees in 1817, article 8, provides as follows:

"And to each and every head of any Indian family residing on the east side of the Mississippi River on the lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land, in a square, to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate, with reversion in fee simple to their children, reserving to the widow her dower, the registry of whose names is to be filed in the office of the Cherokee Agent, which shall be kept open until census is taken as stipulated in the third article of this treaty: *Provided*, That if any of the heads of families for whom reservation may be made should remove therefrom then, in that case, the right to revert to the United States."

The treaty of 1835, referred to in the decision of the Supreme Court, article 12, contains this provision :

"Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and property, shall be entitled to receive their due proportion of all the personal benefits accruing under this treaty for their claims, improvements, and per capita as soon as an appropriation is made for this treaty."

There was an additional provision allowing the Indians referred to in that article to have a pre-emption right to 160 acres of land to be given to those who were desirous to reside within the States of North Carolina, Tennessee, and Alabama. A supplemental treaty to this, proclaimed May 23, 1836, relinquished and declared void the pre-emption rights and reservation provided for in the treaty of 1835.

These two articles, however, in the treaties of 1817 and 1835 clearly indicate the intention of Congress that such Cherokee Indians as were averse to removal to the country west of the Mississippi might become citizens of the States where they resided.



In the case of the *United States v. Boyd et al.*, decided by the Circuit Court of the United States for the Western District of North Carolina, in June 1895 (68 Federal Reporter, pp. 577-585), it was held that "the Indians belonging to the Eastern Band of Cherokees in the State of North Carolina have never become citizens of the United States, and the Federal courts have jurisdiction to entertain a suit brought by the United States, as guardian of such Indians, for the protection of their interests.

In the opinion of the Circuit Court of the United States in this case, the court used this language:

"By the treaty of New Echota (treaty of 1835) the individuals and families who were averse to removal with the Nation were suffered to remain in the States in which they were living, if they were qualified to take care of themselves and property and were desirous of becoming citizens of the United States. Those who exercised these privileges terminated their connection with the Cherokee Nation."

*Eastern Band of Cherokee Indians v. United States*,  
117 U. S., 288; 6 Sup. Ct., 718.

Did this make them citizens of the United States? The Circuit Court here quotes with approval the decision of the Supreme Court in the case of *Elks v. Wilkins* (*supra*), and then continues as follows:

"There is nothing in the record going to show that these Indians (Eastern Band of Cherokees) were ever naturalized. Have they been made citizens by treaty?"

Article 12 of the treaty of 1835 is then quoted by the Circuit Court, and its opinion continues as follows:

"This does not confer on them citizenship. It only authorized them to become citizens when it is recognized that they are qualified or calculated to become useful citizens."

The court then pointed out that they could only

become citizens of the United States by naturalization. The court continued as follows:

"But it must not be understood that these Cherokee Indians although not citizens of the United States, and still under pupilage, are independent of the State of North Carolina. They live within her territory. They hold lands under her sovereignty, under her tenure. They are in daily contact with her people. They are not a nation or a tribe. They can enjoy privileges she may grant. They are subject to her criminal laws. None of the laws applicable to Indian reservations apply to them. All that is decided is, that the Government of the United States has not yet ceased its guardian care over them nor released them from pupilage."

It was also conceded in this opinion that the North Carolina Cherokees were recognized citizens of the State of North Carolina. That they voted, paid taxes, worked roads and performed all the duties of said State. The Circuit Court, in the case above referred to, in its opinion further states as follows:

"The case of the Cherokee Trust Fund (117 U. S., 288; 6 Sup. Ct., 718) does not conflict with these views. That case decides that this Eastern Band of Cherokee Indians is not a part of the Nation of Cherokees with which this Government treats, and that they have no recognized separate political existence; and at the same time their distinct unity is recognized, and the fostering care of the Government over them as such distinct unit."

It is clearly held in this opinion of the Circuit Court of North Carolina that the Eastern Band of Cherokees is not a part of the Cherokee Nation as now constituted. And if the Eastern Band Cherokees which have preserved a distinct tribal organization under the tutelage of the United States, is not a part of the Cherokee Nation as now constituted, it follows even with greater force that those Indians who removed their effects out of the old Cherokee Nation before the removal of its citizens west of the Mississippi River, as well as those who removed from the limits of the Nation as now constituted

and become citizens of any other government, have forfeited all their rights and privileges as citizens of the Cherokee Nation.

The decision of the Supreme Court in the case of *Elk v. Wilkins* (*supra*) was handed down November 3, 1884. A little over two years thereafter Congress passed an act, February 8, 1887 (24 Stat. at Large, 388), with the evident purpose to define the status of Indians situated as was Elk, the plaintiff in the case.

This act declares an Indian, who has taken up his residence in the United States, separate and apart from his tribe, and who has adopted the habits of civilized life, to be a citizen of the United States, and entitled to all the rights, privileges, and immunities of other citizens thereof; and that such citizenship is conferred "without in any manner impairing or otherwise affecting the right of such citizen to tribal or other property." This act of Congress is important in determining the status of Cherokee Indians who have taken up a residence in the States, separate and apart from the tribe, and have adopted the habits of civilized life. Such Indians were declared, February 8, 1887, to be citizens of the United States. And those Indians who have never been recognized as members of the Cherokee Nation, as it is now constituted, have never had any right to tribal property in said Nation, and hence they have no rights in the Nation which could in any manner be impaired or otherwise affected by being declared citizens of the United States. If such Indians have any tribal rights to be impaired, they were rights in the old Cherokee Nation or in the Eastern Band of Cherokee Indians, now located as a separate tribe in North Carolina. If there are any Cherokees who have ever been recognized as citizens of the Cherokee Nation as now constituted, who have separated themselves from the Nation, and taken up their residence in the States, and have removed their effects out of the Nation, they would, by the act of Congress of February 8, 1887, be citizens of the United States, and by the constitution and laws of the Cherokee Nation they would have forfeited their rights as citizens of the Nation. The Cherokee constitution and laws were not abrogated or repealed by the act of

Congress of February 8, 1887, for the reason that the United States has ceded to the Cherokee Nation the right to determine who shall be citizens thereof.

A careful examination of the treaties which have been made with the Cherokee Nation by the United States will clearly establish the fact that nowhere does it appear that Cherokee Indians who have separated themselves from the tribe or taken up their residence in the States are taken into consideration, except the provisions in reference to the Eastern Band of Cherokees, and those in reference to Cherokees who accepted reservation of land under article 8 of the treaty of 1817, and those who received their due proportion of all personal benefits accruing under the treaty of 1835, article 12. The treaties in reference to those classes of Cherokee Indians recognized the fact that they had separated themselves from and ceased to constitute a part of the Cherokee Nation. And, as is held by the Supreme Court of the United States in the case of the Eastern Band of Cherokees against the Cherokee Nation (*supra*), these Indians "ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the States in which they resided." And further, if Cherokee Indians who have separated themselves from the Cherokee Nation, and have taken up their residence in any of the States of the Union, wish to enjoy the benefits of citizenship in the Cherokee Nation, they must comply with the constitution and laws of the Cherokee Nation, and be readmitted to citizenship as therein provided. They can not live cut of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation."

By the terms of various treaties between the United States and the Cherokee Nation, during the time the Nation was divided into the Eastern and Western tribes, the annuities were divided between the two branches of the Nation, according to their respective members, to be ascertained by a census to be taken. The annuities thus divided were regularly paid as stipulated until commuted by the treaty of 1835. This clearly shows that the United States regarded those Cherokees

only who were citizens of the Nation as entitled to annuities and as having any right or interest in Cherokee lands or property.

### **Purchase of the Cherokee Outlet.**

Counsel for the Cherokee Nation contend that the treaty with the Cherokee Nation for the purchase of what is known as "The Cherokee Outlet" expressly recognized the right of the Cherokee Nation to determine for itself who were entitled to citizenship. It is true that two considerations were expressed in the treaty: One of money, and the other in reference to intruders. Article one of the treaty ceded the lands in the Cherokee Outlet to the United States.

Article two is as follows:

"For and in consideration of the above cession and relinquishment the United States agrees:

"FIRST. That all persons now residing, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation or not in the employment of citizens of the Cherokee Nation, in conformity of the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not residents in the Cherokee Nation under the provisions of treaty or act of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section 6 of the treaty of 1835 and sections 26 and 27 of the treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said Nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation."

Counsel for the Cherokee Nation contend that the foregoing provision was deemed a greater consideration to the Cherokees than the money actually paid them, and that the legislation contained in act of June 10, 1896, conferring upon the United States commission and this

court authority to determine who were citizens of the Cherokee Nation is in violation of the letter and spirit of this treaty and impairs the obligation of the contract of purchase; that contracts made by the Government with individuals are binding upon the Government, and that the Government is subject to the same obligations as individuals.

If it should be conceded, for the sake of argument, that this position is correct, the conclusion would follow that the contract for the purchase of the Outlet had been impaired by subsequent legislation, and that a portion of the consideration of purchase had failed. In that event, if this position be well taken, the Cherokee Nation might demand additional pecuniary consideration for the sale of the Outlet, the amount to depend upon the damages, if any, which the Cherokee Nation had sustained. It would not follow, in any event, that the United States had no power to enact the legislation conferring authority upon the United States commission to prepare rolls, and the jurisdiction upon this court under which citizenship ceases are now being heard and determined.

### **Power of Congress Over Indians.**

In the first treaty made between the United States and the Cherokee Nation, which was concluded November 22, 1785, at Hopewell, on the Keowee, it was expressly provided in article 3, as follows:

"That said Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whomsoever."

And by article 9 of said treaty it was provided as follows:

"For the benefit and comfort of the Indians, and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians and managing all their

affairs in such a manner as they (the United States in Congress assembled) think proper."

These provisions have never been abrogated, and the power has always been preserved in Congress of managing all the affairs of the Cherokees in such manner as Congress should think proper.

During the Revolutionary War the Cherokees had adhered to Great Britain, and this first treaty with them provided for a general exchange of prisoners; and the 13th, or concluding article, was as follows: "The hatchet shall be forever buried, and the peace given by the United States and friendship re-established between the said States on one part and all the Cherokees on the other shall be universal." This evidently explains the reasons which induced the United States to incorporate in this treaty the foregoing provisions.

It is true that for many years the United States pursued a policy of making treaties with the Indian nations and tribes, but that policy did not recognize the Indian tribes or nations as independent sovereignties. Their dependence upon and subjection to the authorities of the United States have always been conceded. Congress may in its discretion legislate for them and concerning them in such manner as Congress may deem proper, subject only to the Constitution of the United States.

### Summary.

This court will now proceed to consider the cases before it on appeal from the United States commission, in reference to citizenship in the Cherokee Nation. A separate opinion will be submitted later on in the term in reference to citizenship in the Creek Nation.

In determining who are citizens of the Cherokee Nation, the following propositions will govern this court:

FIRST. That those Indians who have separated themselves from the present Cherokee Nation, or from the old Cherokee Nation east of the Mississippi River, and have taken up their residence in the States, and have moved their effects out of the limits of the Nation, and



the Eastern Band of Cherokee Indians, who remained in the States after the treaty of 1835, have forfeited all their rights and privileges as citizens of the Nation, and that such persons can not regain their citizenship unless they comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided.

SECOND. That this court recognizes the legislation of the Cherokee Nation constituting the Supreme Court, and thereafter the Chief Justice of the Supreme Court tribunals to pass upon certain classes of citizenship cases, and also the legislation of the Cherokee Nation creating commissions with prescribed powers to pass upon applications for citizenship in the Cherokee Nation, as passed in accordance with the general legislative power of the Nation, and will respect such legislation to the extent that it may be in accordance with the Constitution and laws of the United States and the treaties made between the United States and the Cherokee Nation. In construing such legislation the court will apply to it the same general principles of statutory construction which should be applied to the statutes of any of the States of the Union or to the statutes of the United States.

THIRD. That blood alone is not the test of citizenship in the Cherokee Nation. That those Cherokees, and their descendants, who have separated themselves from the Nation, and have removed their effects from it and taken up their residence in any of the States of the Union have ceased to be citizens of the Cherokee Nation.

And further, that bona-fide residence in the Nation is essential to citizenship.

FOURTH. Full faith and credit will be given to the judgments of tribunals and commissions in citizenship cases, unless it is made to appear that the tribunal or commission acted without jurisdiction, or that its judgment was procured by fraud, as more fully explained in this opinion. The acts of the Cherokee council in the determination of applications for citizenship in the Nation will be regarded as judgments of a court and will be subject to the same tests as to their validity.

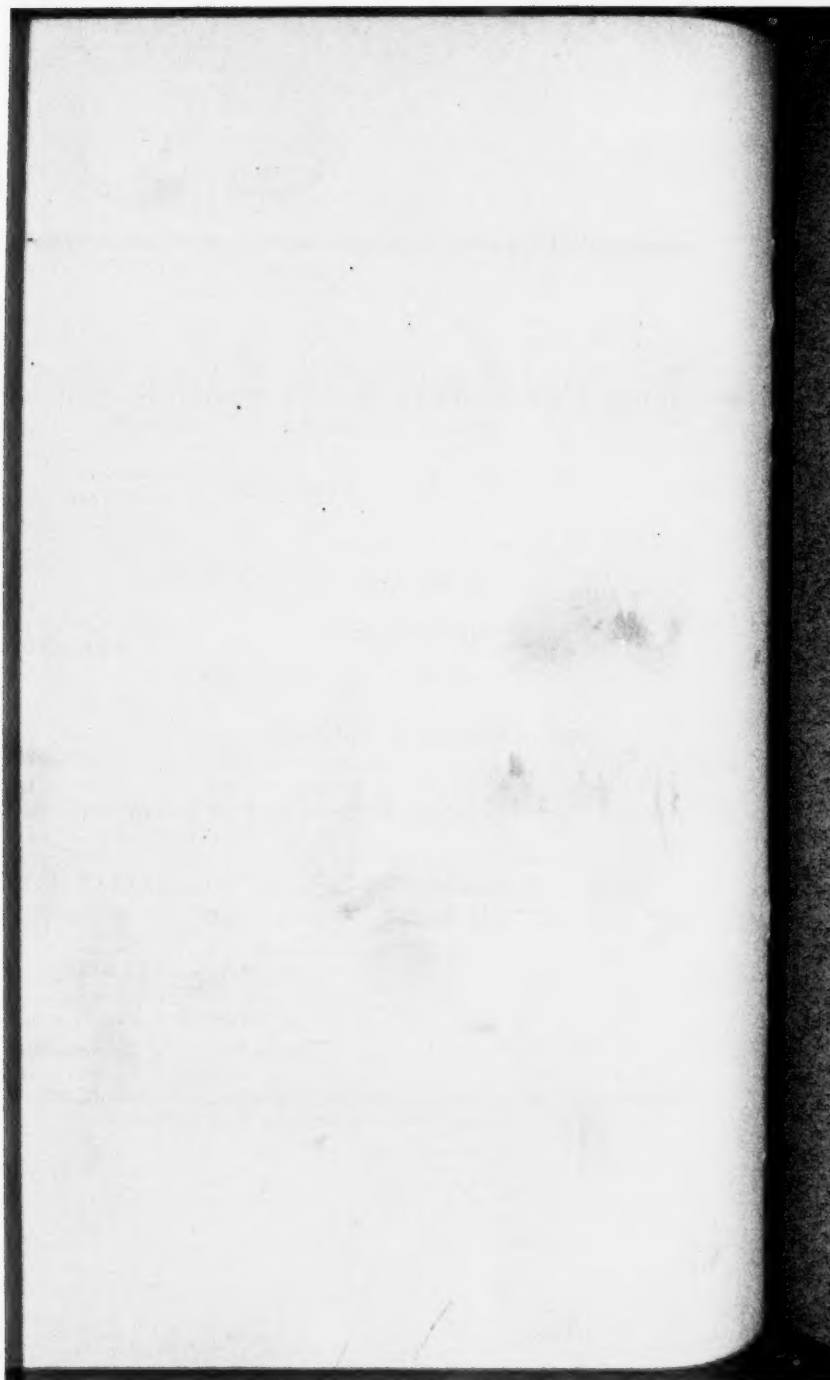
## UNITED STATES OF AMERICA.

*Indian Territory, Northern District.*

I, William M. Springer, Judge of the United States Court for the Northern District of Indian Territory, do hereby certify that the within and foregoing is a true and perfect copy of my General Opinion delivered on December 3d, 1897, on the question of Citizenship in the Cherokee Tribe or Nation of Indians, as the same appears to me from the original opinion now in my custody.

Witness my hand on this 1st day of December, A. D. 1898.

WM. M. SPRINGER,  
*United States Judge aforesaid.*



No. 423.

By. of Edmiston, Garland & May,  
For Appellants.

Office Supreme Court U.  
FILED

FEB 24 1899

Filed Feb. 24, 1899.  
Supreme Court of the United States.

October Term, 1898.

WILLIAM STEPHENS, MATTIE J. AYERS,  
et al., Appellants,

vs.

THE CHEROKEE NATION.

No. 423.

Appeal from the United States Court in Indian Territory.

REPLY BRIEF FOR APPELLANTS.

H. M. EDMISTON,  
R. C. GARLAND,  
HEBER J. MAY,

Attorneys for Appellants.

ROBERT A. WALLACE, LAW PRINTER, Washington, D. C.



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1898.

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WILLIAM STEPHENS, MATTIE J. AYERS, <i>et al.</i> , Appellants,  vs.  THE CHEROKEE NATION.	}       No. 423.
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**Appeal from the United States Court in Indian  
Territory.**

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**Reply Brief of Appellants.**

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**1. Act Allowing Appeals to Supreme Court.**

The provision in the Indian Appropriation Act of July 1, 1898, confers jurisdiction on this Court to entertain jurisdiction of appeals direct from the United States courts in Indian Territory in all citizenship cases. The cases appealed are all citizenship cases purely. As to the clause in the act in regard to the constitutionality or

validity of any legislation affecting the citizenship of the parties, it was evidently intended to broaden the jurisdiction of the Supreme Court rather than to limit it.

Objection was taken to the jurisdiction of the Dawes Commission, and also to the jurisdiction of court in Indian Territory, upon the ground that the act of Congress conferring the jurisdiction was invalid. But upon a review of the authorities we are convinced that Congress had power to enact the legislation. These appeals will be submitted to this Court therefore upon their merits.

If Congress had wished to send these appeals here upon a jurisdictional question alone, it could and would have said so. The proposed amendment printed in the brief of appellee's counsel proves nothing but that an effort was made to send the cases to the Circuit Court of Appeals first and then here. The legislation prevented this circuitry of procedure. There was no way to get these cases into this Court by *certiorari* unless by special act of Congress. If they had been sent to the Circuit Court of Appeals they did not fall within any of the heads or classes of cases made final by section 6 of the Judiciary Act of March 3, 1891. (26 Stat., 826.) They might, where more than \$1,000, besides costs, was involved, have been brought to the Supreme Court under the paragraph of section 6 allowing appeals. Congress evidently understood the subject, and gave the parties the benefit of a direct appeal, and provided for an early adjudication of their cases upon their merits.



## II. General Statement.

Blood has always been the natural and chief ground of citizenship recognized by the Cherokee tribe. They have, however, in recent years admitted into their tribal citizenship white persons who have intermarried with Cherokees. Nearly all of the appellants in these cases have Cherokee blood, as shown by the findings of facts of the special master in each case.

The others, and there are but few of them, claim the right to citizenship by intermarriage with Cherokees.

A large majority of the appellants have resided continuously in the Cherokee Nation for many years. Some of them for more than twenty years. Mr. Stephens, whose name appears in the title of this case, has resided uninterruptedly in the Cherokee Nation for more than a quarter of a century, having moved there in 1870.

There may be found an appellant now and then who resides outside of the Cherokee Nation, and in such instances the claim to citizenship depends on blood alone, regardless of residence.

There is another class of cases, notably those like the Cobb and Flippen cases, in which the appellants were recognized as citizens by the proper Cherokee authorities, and placed upon the roll, but about a dozen years afterwards their names were stricken off on accusation that they had obtained their enrollment by fraud.

Judge Springer held that the finding of the second Cherokee commission in these cases was *res adjudicata*.

The general questions presented for determination in these appeals may be stated as follows :

1. Claims of appellants to citizenship based on Cherokee blood and *bona-fide* residence in the Cherokee Nation.

2. Claims of appellants who have Cherokee blood, but do not reside in the Cherokee Nation.

3. Claims of appellants who have intermarried with Cherokees and have maintained a *bona-fide* residence in the Cherokee Nation.

4. Claims of appellants who have once been placed upon the roll as having Cherokee blood, but afterward stricken off upon charge of fraud. These appellants have been residents of the Nation for many years, and are Cherokees by blood.

The findings of the special master of the court below show the facts in each case.

The United States courts in Indian Territory heard, *de novo*, citizenship cases of persons belonging to the different tribes.

Judges Springer, Townsend, and Clayton differed as to what constituted qualifications for citizenship. Upon the questions presented Judge Springer held that blood alone is not the test of citizenship in the Cherokee Nation ; that *bona-fide* residence in the Nation is essential ; and it seems that he holds that the enrollment of the applicant for citizenship, or the enrollment of some of his ancestors, is a necessary qualification.

Judge Clayton holds that both residence and blood

are requisite qualifications to citizenship in the Choctaw Nation.

Judge Townsend holds that non-resident Choctaws and Chickasaws who have properly filed their applications and established their membership of the tribes shall be admitted to citizenship.

The diversity of the decisions of the judges of the courts in Indian Territory probably had its influence in bringing about the legislation of Congress allowing appeals to this Court. Like diversity of opinion has been held of sufficient gravity and importance in another branch of the jurisdiction of this Court to justify the issuance of a *certiorari*.

Columbus Watch Co. *v.* Robbins, 148 U. S., 266.

### **III. Statement as to Appellant Stephens.**

Stephens, the appellant in this case, moved into the Cherokee Nation, with his mother, in 1870, and has resided there continuously ever since. His children and grandchildren have been reared there. He moved into the Nation upon an invitation of Chief Downing asking all Cherokees to return to their people and home. (Rec., 3.) The special master finds this to be a fact. (Rec., 46.) In 1873 appellant applied to be admitted to citizenship in the Cherokee Nation. (Rec., 3, 14.) His claim was under consideration until 1887. (Rec., 14.) In the meantime the Cherokee council had been engaged in passing enactments concerning the citizenship roll. Many Cherokees had, no doubt, accepted Chief Downing's invitation, and, like Mr. Stephens, had acquired

equitable rights, at least, in the Cherokee Nation. In June, 1887, the citizenship commission took up Mr. Stephens' claim, and declined to admit him to citizenship upon the authority of an act of the council passed in 1886. (Rec., 14.) The appellant had then been seeking his right as a citizen for thirteen years, and acquiring property interests in the Nation. The commission practically admitted his right to be placed on the citizenship roll. It said in its opinion :

"We are, however, satisfied from the testimony in this case that William Stephens, the applicant, possesses Cherokee blood, as his uncle, William Ellington Shoe Boots, appears on the now resident old-settler rolls of Cherokees of the year 1851, and that he (William Shoe Boots) is the son of old Te-as-ki-yarga, a Cherokee Indian, who died before the treaty of 1835, who was the grandfather of the applicant, William Stephens." (Rec., 14.)

Afterwards the commission reconsidered its action and reported Mr. Stephens' case to the Principal Chief, as the following record attests :

"The above case reconsidered by the commission and reported to the Principal Chief, the same as in the Sayer case, page 197 of this book."

The commissioners transmitted the case to the Principal Chief, and in their letter admitted that they were satisfied that Stephens possessed Cherokee blood, but could not be admitted by them on account of the technical provisions of section 7 of the act of 1886, and as another year had elapsed they included a reference to a new act passed in 1888. (Rec., 16.)

Principal Chief Mayes referred the case in November, 1890, and said :

*" To the Honorable National Council.*

GENTLEMEN : I herewith send papers setting forth the claim of William Stephens to Cherokee citizenship. While it is your duty to reject all fraudulent claims to citizenship, you should be willing to extend to all our race the same rights with ourselves, as this country was intended for homes for the Cherokee people.

You will perceive the report of the commission on citizenship, addressed to me, gives a clear statement of Mr. Stephens' status as a Cherokee, and it was only a technical reason why he was not admitted by said commission.

His right to citizenship by blood was admitted by this commission. Under circumstances connected with the matter, you will find that the commission court was thoroughly satisfied with the genuineness of his claim, and another thing speaks in favor of Mr. Stephens' claim—he has never joined the notorious ' Citizenship Association,' but has modestly relied on what he has just cause to believe to be his rights. No doubt his claim is a just one.

Very respectfully,

J. B. MAYES,  
*Principal Chief C. N."*

(Rec., 16, 17.)

The committee of the council to whom the matter was referred recommended the admission of Mr. Stephens and his family to citizenship, and reported a bill for that purpose, which, for some reason, was never passed. (Rec., 20.) Stephens has not been admitted to citizenship, nor has his claim been rejected. Stephens was permitted to vote. (Rec., 47.) The facts show a species of bad treatment, considering the unanimous admission as to

Stephens' rights, that could not exist elsewhere than in the Cherokee Nation.

And when the case reached the court the special master found the facts in favor of Stephens. (Rec., 46.) And Judge Springer accepted the findings of the special master. (Rec., 80.) A new question was raised in the United States Commission and court, namely, that Stephens had negro blood in his veins. The master found this not to be so. (Rec., 47.) The master's finding in this respect was accepted by Judge Springer. (Rec., 50.)

We have reviewed the facts in this case, because counsel for appellee attempts to mislead by making extracts from the evidence, and placing upon it a construction that may be considered malicious in the face of the facts. We think the case is controlled in this Court by the findings of the master. No exceptions were taken to these findings in the court below, and it is too late to take them now. Besides, Judge Springer has, in express terms, accepted the findings of the master on the points so vehemently discussed in the brief of counsel. We shall insist that the findings of the master control in all of these cases, in the absence of exceptions, objections, and rulings thereon, except as to such exceptions as may appear on the face of the report. This has been the rule since the decision in *Himely v. Rose*, 5 Cranch, 313.

See, also—

*Harding v. Handy*, 11 Wheat., 103, 126 ;

*Story v. Livingston*, 13 Pet., 359, 356 ;

*Tilgman v. Proctor*, 125 U. S., 136.

After the Cherokee people settled in Indian Territory they adopted a constitution, in which occurs the following provision :

“ Whenever any citizen shall remove with his effects out of the limits of this Nation and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease : *Provided*, nevertheless, that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation on memorializing the national council for such readmission.”

Judge Springer has applied this provision to Mr. Stephens and other appellants. (Rec., 51.) The provision is not retroactive, but applies only to “ citizens ” of the Cherokee Nation in the Indian Territory who shall remove with their effects out of the limits of that Nation and become “ citizens ” of some other government. There is nothing to show that Stephens, or the other claimants to whom Judge Springer has applied the provision, ever left the Nation in Indian Territory in violation of this constitutional provision, or that they ever became citizens of any other government. This new constitution superseded all former constitutions of the tribe. Its provisions only apply to such citizens as departed from the Nation after its adoption and became “ citizens ” of some other government. The distinction is marked between a resident of a government and a citizen thereof. And there is such a thing as not being a citizen at all.

Elk v. Wilkins, 112 U. S., 94.



The court below takes the ground that because the mother of the principal claimant was born in Kentucky, and married the father of the principal claimant in Ohio, that her status was fixed thereby as a resident of Ohio, and that she lost her citizenship in the Cherokee Nation. This position is taken for the purpose of applying to the appellants the provision of the new constitution, quoted above, in regard to readmission to citizenship. (Rec., 51.) This position is new in this case. No such objection has been raised in the proceedings in the Cherokee Nation. It is raised by Judge Springer for the first time in the record. There is ample proof, and convincing admissions in the record, that the appellants in this case have the Cherokee blood to entitle them to citizenship. It is also fully shown and admitted that they would have been made citizens except for a legal technicality.

We do not agree with the opinion upon the point that Stephens lost his citizenship by reason of his mother's marriage in Ohio. If this had been so, the authorities of the Cherokee Nation would have imposed the objection instead of waiting for Judge Springer to do so. The status of Stephens as to citizenship in the Cherokee Nation, and among the Cherokee people, is that of the mother, who had the Cherokee blood, and not of the father according to the laws, usages, and customs of the Cherokees. This has been the universal rule among the Cherokees, and this rule has been generally followed in the Executive Departments of the United States Govern-

ment. The status of the child follows the blood wherever it exists.

Counsel for appellee is inclined to ridicule the marriage of Stephens' mother. (Brief, 85.) For the sake of the argument, we are willing to let the proof show just what counsel contends for, and, no matter what the facts may be, aside from such proofs, if the alleged father was a part of a devised story, and had no existence as claimed, and the appellant in this case never knew him, for the reasons intimated, the status of the appellant Stephens would be settled beyond question.

*Alberty v. United States*, 162, U. S., 499, 501;

*Fowler v. Merrill*, 11 How., 375;

*Williamson v. Daniel*, 12 Wheat., 568.

#### **IV. Time of Perfecting Appeals.**

Counsel for appellee says some of the appeals were not perfected in time, because they were not docketed in this court within 120 days after the passage of the act allowing such appeals. We do not understand this to be the law or the rule. An appeal is perfected when it is presented to the court which rendered the decree or judgment appealed from, in such manner as to put an end to its jurisdiction over the cause, and make it its duty to send the case to the appellate court. A writ of error is brought when it is filed in the court which renders the judgment. The same rule applies to appeals.

*Credit Co. v. Ark. Cent. Railway*, 128 U. S., 258 ;

*Aspen Mining Co. v. Billings*, 150 U. S., 31.

### V. Trials *de novo* and Vested Rights.

Some question has been raised, probably by all parties, as to the jurisdiction of the United States court in Indian Territory, for the reason that an appeal would not lie from the commission to the court. The legislation of Congress is in perfect accord with previous acts of Congress in this respect, and is so well settled that it seems scarcely necessary to refer at length to such legislation and to the decisions of the Supreme Court by which it is given its proper construction, effect, and enforcement. Congress fully understood, from many precedents, the scope and character of this legislation when it enacted it.

Judge Springer, in the light of former legislation upon the subject and the decisions of this court, also gave the act here under discussion its proper construction. He immediately announced rules in his court specially governing the procedure in citizenship cases, in which provision is made for hearing and determining the cases *de novo*. (Printed record in Cobb case, p. 143.)

The contention in this regard is not new, and is based upon a class of cases that have been uniformly distinguished from the line of cases to which the case at bar belongs.

In *Ritchie v. United States* (17 How., 525), it was insisted that the United States courts had no jurisdiction, because the case was transferred by appeal from a commission which was a non-judicial body to the court. This Court sustained the jurisdiction of the courts, and said :

"But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in the court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce." (P. 534.)

Hundreds of land claims were heard and determined in the United States courts in California under the decision in Ritchie's case, some of which were appealed to this Court. A table of these land cases, showing the disposition made of them, may be found in volume 30 of Federal Cases, commencing at page 1217.

The Supreme Court also refers in the opinion in Ritchie's case to analogous proceedings before the United States court under section 1 and section 3 of an act of Congress of May 26, 1824 (4 Stat., 52, 53), concerning French and Spanish claims in Missouri, which had previously been heard before a commission.

Provision is made by section 16 of the act of Congress to regulate commerce (24 Stat., 379), for the transfer of cases from the Interstate Commerce Commission to the United States court. The question of jurisdiction was raised in the United States Circuit Court in *Kentucky and Indiana Bridge Co. v. Louisville and N. R. Co.* (37 Fed.

Rep., 567, 610, 615); and Mr. Justice Jackson followed the decision in *United States v. Ritchie*, (17 How., 525), and said :

“The rule laid down in that case is directly applicable to the present proceedings, and sustains the construction which we place upon the provisions of section 16 of the law under consideration.”

In *Cherokee Nation v. Kansas Railway Co.* (135 U. S., 641) this Court passed upon exactly the same question. Congress passed an act to grant the railroad company the right of way through the Indian Territory (23 Stat., 73), and provided in section 3 for the appraisal of property by disinterested referees to be appointed by the President.

Provision was also made in the same section for an appeal to the courts from the finding of the referees by filing an original petition in the court and for a trial *de novo*. (Pp. 643, 644.) The Supreme Court sustained the appeal or proceedings in the District Court, and also the appeal of the Cherokee Nation to this Court.

The decisions above noted and the legislation upon which they rest are sufficient to settle the question here presented in this respect.

## **VI. Appeals provided for by law after final judgment or decree.**

In *Calder v. Bull* (3 Dallas, 386) this Court held that a resolution or law of the State of Connecticut, setting aside a decree of the probate court, and granting a new hearing before the same court, with liberty of appeal to

the Superior Court and from that court to the Supreme Court of Error of the State, being the highest tribunal of the State, was held not to contravene the Constitution of the United States. A distinction is drawn in this case between legislative judgments and remedies provided by law. The law of Connecticut, allowing the appeal, was not prohibited by the Constitution of the United States.

In *Sampeyreac v. United States* (7 Peters, 222) an act of Congress (4 Stat., 399), authorizing the Superior Court of the Territory of Arkansas to entertain jurisdiction of a bill of review to revise certain decrees which were final, it was held by the Supreme Court, on appeal, that the act giving the new remedy by bill of review was constitutional, and that Congress had power to mold this remedy and dispense with technical rules concerning bills of review. It will be noted that this was Congressional legislation in reference to decrees in Territorial courts, as in the case at bar.

In *Freeborn v. Smith* (2 Wall., 160), the facts show that the act of Congress admitting the Territory of Nebraska into the Union as a State did not provide for prosecution of the appeals then pending in the Supreme Court from that Territory. In other words, the remedy in such cases was suspended. Legislation was absolutely necessary to revive the remedy. It may be that such legislation is retrospective, but there is nothing in the Constitution forbidding retrospective legislation in relation to remedies. It seems to be well settled that, in such cases, where there is no direct constitutional pro-

hibition Congress or the legislature of a State may pass retrospective laws affecting remedies. Such acts are of a remedial character, are peculiar subjects of legislation, and are not liable to the imputation of being assumptions of judicial power.

In *Freeland v. Williams* (131 U. S., 405-420) the question arose upon an act of the legislature founded upon the Constitution of West Virginia of 1872. The Constitution of the State declared that citizens should not be liable upon judgments or decrees previously rendered and growing out of acts connected with the civil war. The act of the legislature provided a remedy which, in effect, neutralized or rendered inoperative all such judgments and decrees. This is a case of tort. The retrospective provisions of the Constitution and of the act of the legislature were upheld as remedial, and as not interfering with vested rights.

In this case the Court says:

"Prior to the adoption of the Fourteenth Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded." (*Calder v. Bull*, 3 Dall., 386; *Satterlee v. Matthews*, 2 Pet., 380; *Sampeyreac v. United States*, 7 Pet., 222; *Watson v. Mercer*, 8 Pet., 88; *Freeborn v. Smith*, 2 Wall., 160.) "In the latter case Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: 'If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of Chief Justice Parker, in *Foster v. Essex Bank*, 16 Mass., 245:



'The truth is there is no such thing as a vested right to do wrong, and the legislature which, in acts not expressly authorized by the Constitution, limits itself to correcting mistakes *and to providing remedies for the furtherance of justice*, can not be charged with violating its duty or exceeding its authority.'"

It is added in the opinion that many other cases might be cited in which retrospective statutes, when not of a criminal character, though affecting the rights of parties in existence, are not forbidden by the Constitution of the United States. The remedy provided by the Constitution and legislation of West Virginia was upheld.

It will be observed that *Satterlee v. Matthewson* (2 Pet., 380) is approved in express language in the opinion in *Freeland v. Williams*, and that *Watson v. Mercer* is also cited. In fact all of the cases that were decided prior to the Fourteenth Amendment are cited in the opinion of the court, apparently with approval, and with the suggestion "that many other cases might be cited," etc. This will answer a paragraph on page 11 of appellee's brief.

In *Garrison v. City of New York* (21 Wall., 196, 205), in which the Supreme Court passed upon the question of a vested right in a judgment, an act of the legislature of the State of New York allowing an appeal, which was a new remedy, two months after the judgment became final, was sustained. The Court said :

"There is no such vested right in a judgment in the party in whose favor it is rendered as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed."

This is one of the cases quoted from and relied on in *Freeland v. Williams* (131 U. S., 405, 420).

### **VII. Power of Congress to make Laws, etc., for Cherokee Nation.**

It is admitted that Congress may legislate for the Cherokee Indians and concerning them in such manner as it may deem proper, subject only to the Constitution of the United States.

This right and power of the United States was retained in the first treaty made with the Cherokees, and has never been abrogated or abandoned. On the contrary, Congress has at all times passed such laws, in its discretion, as the interest of the United States and the Cherokees required.

In fact, the Congress has always managed the affairs of the Cherokees by such laws as were deemed necessary, and the government of these people is now controlled, as far as desired, by legislation of Congress. Indian Territory, and the respective Indian nations embraced in it, comprise a Territory simply, and the local laws are only entitled to such respect as are given to the laws of other Territories. Congress may abrogate them at will. As a matter of fact, the power of Congress over the Cherokee Nation is twofold, inasmuch as it exercises its authority, (1) by constitutional grant, and (2) by a treaty stipulation in which it is authorized to manage all of the affairs of the Cherokee Nation. Only the first grant of power applies ordinarily to the territory of the United States.

This being so, the local laws of the Cherokee Nation

are not entitled to the same respect in their application and construction as the laws of States.

There is quite a difference in a law that can be abrogated by act of Congress and one that requires judicial procedure to declare its repugnancy to the Constitution or laws of the United States.

Congress has never provided by law for testing the laws of the Cherokee Nation as to Federal questions, as it has done in the States, for the reason that Congress has itself retained and exercised control over such territorial legislation of the Cherokees. It was never intended to erect a State for any purpose whatever out of the Cherokee Nation, but the contrary is apparent from the provisions of the treaties, the legislation of Congress, and the general management of the affairs of that Nation by the Executive Departments of the United States.

In this view of the case, we think Judge Springer has erred in his decisions in the citizenship cases in construing the legislation of the Cherokee Nation, and applying to it "the same general principles of statutory construction which should be applied to the statutes of any of the States of the Union." No matter what construction may be given to an act of the Cherokee council by a Cherokee court, the Congress may approve, abrogate, or disregard the law and its construction; but Congress can not do this with a statute of a State. Congressional control and construction of laws and decisions is one thing, a judicial construction is quite a different thing. But let us examine some of the decisions of this Court upon the subject.

Judge Springer relies upon the case of the Eastern

Band of Cherokee Indians *v.* United States (117 U. S., 288), which is also entitled "The Cherokee Trust Funds." He quotes extensively from the opinion of this Court and from the opinion of the Court of Claims.

The Eastern Band of Cherokees resided in the States and never removed, individually or collectively, to the Cherokee Nation in Indian Territory. They contended that they were entitled to share in certain funds of the Cherokee Nation in Indian Territory, upon their view of the terms of the treaty, no matter where they resided. Upon the question presented, the Attorney General, and this Court, and the Court of Claims held that if Indians residing in the States wish to enjoy the benefits of the common property of the Cherokee Nation they must comply with the Constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided; that they can not live out of the Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. The decision was rendered in this Court March 1, 1886; the decision of the Court of Claims was rendered June 1, 1885; the act of Congress authorizing the suit was passed March 3, 1883.

Many of the appellants in these citizenship cases were residing in the Cherokee Nation when the law was enacted authorizing the suit of the Eastern Band and when the decisions in the courts were rendered. Some of them had applied for citizenship, and others had been put on the rolls years before and were about that time stricken off. Of course the decision relating to the Eastern Band

of Indians does not apply to this class of Cherokees. That decision relates to a band of Indians who resided in the States, and who insisted that they had the right to reside there and also share in the funds of the Nation in the Indian Territory. They were contending for a property right in certain funds of the Cherokee Nation, regardless of their residence and citizenship; the appellants in these cases are contending for the right of citizenship only, and their claim is based on Cherokee blood or Cherokee blood and residence. And some of the appellants in these appeals removed into the Cherokee Nation, after the decision in the Eastern Cherokee Band case, for the express purpose of complying with the law there announced.

The proposition that the Cherokee Nation is a State or a sovereign like the United States, has been persistently presented at all times by the Cherokees; but it has been uniformly denied by the decisions of this Court and other tribunals of the United States. Judge Springer alone has recognized the laws of the Cherokee Nation to be on the same footing, for any purpose whatever, with the laws of the States, and we may add of the United States.

We shall not go over all the cases in which this Court has turned down the alleged sovereignty of the Cherokee Nation as compared to the sovereignty of the States and of the United States.

In the *Cherokee Nation v. Kansas Railway Co.* (135 U. S., 641, 653) the proposition was presented, on behalf of the Cherokees, that the Cherokee Nation is sovereign

in the sense that the United States are sovereign, or in the sense that the several States are sovereign. In response to the modest claims of the Cherokee Nation in this respect, this court reviewed the former decisions upon the subject, commencing with *Cherokee Nation v. Georgia*, 5 Peters, 1, and including *Worcester v. Georgia*, 6 Pet., 515, 557, 569; *United States v. Rogers*, 4 How., 567, 572; *United States v. Kagama*, 118 U. S., 375, 379; *Choctaw Nation v. United States*, 119 U. S., 1, 27, and many others.

According to the conclusion from these opinions the Cherokee Nation and other Indians in the Territory who are pleased to designate themselves "Nations," are "Indian tribes," simply, and nothing more; they are dependent political communities, subject to the paramount authority of the United States. They are no more entitled to statehood or to have their local ordinances construed as are the laws of States than are the Apaches, the Comanches, the Mescaleros, or other bands and tribes.

By section 1 of the act of March 3, 1871 (16 Stat., 566), now section 2079 of the Revised Statutes, Congress took away all recognition of independence of Indian nations and tribes.

The doctrine announced in *Cherokee Nation v. Kansas Railway Co.*, 135 U. S., 641, was affirmed in *Talton v. Mayes*, 163 U. S., 376, 382, in passing upon a question of practice in regard to the laws of the Cherokee Nation concerning the constitution of the grand jury.

### **VIII. Power of Dawes Commission under the Act of Congress, etc.**

The contention that the Dawes Commission was sent to the Indian Territory simply for the purpose of making up a complete roll of the citizens of the Cherokee Nation seems to absurd too admit of discussion in the face of the act of Congress.

The fact that enrollment had been denied for years to Cherokees who were entitled to it, and the further fact that such Cherokees had been put on and off the roll at the pleasure of those in authority, led Congress to enact a law taking the question of citizenship out of the control of the Cherokee authorities, either directly or by appeal to the courts of the United States. The abuse of the roll became notorious.

The Dawes Commission was appointed to negotiate for the extinguishment of the tribal title to the lands. In investigating matters, the Commission acquired knowledge of the abuse and manipulation of the citizenship roll, and reported the facts to the Secretary of the Interior. The Secretary embodied the report of the Dawes Commission in his report to the President, and it is a part of Exhibit A. The report of the Commission consequently reached Congress at its December session, 1895. On June 6, 1896 (29 Stat., 321), Congress passed the act conferring jurisdiction on the Dawes Commission in citizenship cases.

In order to advise this court of the reasons for the legislation taking the citizenship out of the control of



Cherokee authorities, we reprint the statement of the Commission as it is found at pages 91 and 92 of the report of the Secretary of the Interior for 1895. The language of the Dawes Commission is as follows :

“Citizenship in these nations has been left by the National Government entirely under the control of authorities in the several existing governments.

The citizenship roll of the Cherokees has dealt with a larger number than any of the others, affecting, as it does, all North Carolina Cherokees who desire to become a part of the Nation, and a more liberal policy of adoption by intermarriage and otherwise than exists in the other tribes.

A tribunal was established many years ago for determining the right of admission to this roll, and it was made up at that time by judicial decision in each case. Since that time and since the administration of public affairs has fallen into present hands, this roll has become a political football, and names have been stricken from it and added to it and restored to it without notice or rehearing or power of review, to answer political or personal ends, and with entire disregard of rights affected thereby. Many who have long enjoyed all the acknowledged rights of citizenship have, without warning, found themselves thus decitizenized and deprived both of political and property rights pertaining to such citizenship. This practice of striking names from the rolls has been used in criminal cases to oust courts of jurisdiction depending on that fact, and the same names have been afterwards restored to the roll when that fact would oust another court of jurisdiction of the same offense. Glaring instances of the entire miscarriage of prosecutions from this cause have come to the knowledge of the commission, and cases of the greatest hardship affecting private rights are of frequent occurrence. This practice is persisted in in defiance of an expressed opinion of the Attorney General of the United States forwarded to this Nation on a case presented that it was not in

their power to thus decitizenize one who has been made a citizen by this tribunal clothed by law with the authority. There is no remedy but an interference of the United States.

The 'intruders' roll' is being manipulated in the same way. This 'intruders' roll' is the list of persons whose claim to citizenship is denied by the Nation, and who, by the agreement in the purchase of the 'Cherokee Strip,' the United States are to remove from the Territory by the 1st of January next. This roll is now being prepared for that purpose by the Cherokee authorities in a manner most surprising and shocking to every sense of justice, and in disregard of the plainest principles of law. The chief assumes to have authority to 'designate' the names to be put upon the intruders' roll, and names are, by his order, without hearing or notice, transferred from the citizens' roll to that of intruders, so that, on January 1, 1896, the United States will be called upon to remove from the Territory, by force if need be, thousands of residents substantially selected for that purpose by the chief of the Nation. It has been made clear to the commission that the grossest injustice and fraud characterize this roll. Persons whose names have been upon the citizens' roll by the judicial decree of the tribunal established by law for that purpose for many years, some of them for twenty or more, persons who have enjoyed all the rights of citizens, unquestioned by any one until distribution per capita of the strip money, have been, by the mere 'designation' of the chief, stricken from the citizens' roll and put upon that of intruders, with notice to quit before January next. Children of such parents, born in the Nation, now of age, with families and homes of their own, are receiving this notice to leave forever all they have earned and the homes they have built for themselves, and this at the will of the chief alone. If the United States Government removes such persons it will become a participant in this fraud and injustice, for which ignorance alone can form any excuse. The commission

feel it a duty to call attention to these facts, and invoke the direct intervention of the Government to prevent the consummation of this great wrong.

These remarks apply specially to the Cherokee Nation, with which the United States has recently entered into obligations in respect to 'intruders.' But much of what is here said is applicable also to the condition of affairs in the other nations. In these nations many persons coming to the Territory by invitation of the governments themselves, or under the provisions of the laws enacted by them, and acquiring citizenship, with homes and property, in conformity to such laws, have been in many instances stricken from the rolls of citizenship by those in power for political and personal purposes, and laws enacted and other means resorted to to deprive them of the homes and property acquired.

The commissson is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

The above is what influenced Congress in enacting the legislation upon the subject, and nobody can well question the necessity for it. To say Congress, in view of the facts, authorized the Dawes Commission simply "to make a complete roll of all Cherokee citizens," without hearing and determining the cases, is to accuse Congress of having done a vain and foolish thing. Besides, Congress, by the very act conferring power on the commission "to proceed at once to hear and determine the applications of all persons who may apply to them for citizenship," also confirmed *the existing rolls of citizenship in the Cherokee Nation.*

Our construction of the act of June 10, 1896, is that Congress confirmed the existing roll with such additions as might be added to it by applications to the Cherokee court or commission according to the provisions of the act. And this construction is, in effect, given to the act by the act of June 7, 1897. Applicants could elect whether they would go to the Cherokee court or commission, or to the Dawes Commission, and in either case there was a right of appeal to the United States court. The object of Congress was to take the question of citizenship, either directly or indirectly, away from the Cherokee authorities in order that exact justice and equity might be done the claimants.

Provision is made by the act, (1) for a hearing and determination of the applications of persons entitled to citizenship, and to determine the right of such applicants to be admitted and enrolled. Complete jurisdiction is conferred on the commission. The other provisions of the act relate to procedure before the commission, and it is to be presumed they were followed. The commission, not the United States courts, was required to respect all laws of the Cherokee Nation or tribe not inconsistent with the laws of the United States, and all treaties with that Nation or tribe, and give due force and effect to the rolls, usages, and customs. The commission was also given power to administer oaths and take testimony, etc.

These rules of procedure were prescribed especially for the guidance of the commission, which was a temporary tribunal. When the cases reached the United States courts, they were tried *de novo*, and the general

rules of practice and procedure applied to them. The procedure prescribed for the Dawes commission had served its purpose.

Just what consideration or respect is to be given to the laws, usages, or customs of the Cherokee Nation in the matter of citizenship cases here is a question for this Court to determine, regardless of the provisions of the act of June 10 conferring powers on the commission in this respect.

It will be an interminable task to undertake to construe, understand, or reconcile the laws and other acts of the Cherokee Nation. They seem too numerous to mention.

Judge Springer mentions quite a number of them, and then says *numerous* other acts in reference to citizenship were passed from time to time by the national council.

The truth is the acts of the council in this respect were so frequent and so different that it was scarcely worth while to make application for citizenship under them. For instance, Mr. Stephens, the appellant in this case, made application for citizenship in 1873, and was trifled with until 1887, and was refused admission under a section of a law passed by the council in 1886. (Rec., 3, 14.)

Under all these circumstances, there is but one way to assure justice to the appellants and that is to determine these cases under the provisions of the laws of the United States, *de novo*, regardless of the jumble of citizenship laws of the Cherokee Nation. Congress

evidently intended this should be done, and it is the only way to do equity in the cases.

(2) The provision of the act conferring jurisdiction on the court or commission of the Cherokee Nation need not be specially referred to, as none of these appeals fall under it.

Respectfully submitted.

M. M. EDMISTON,  
R. C. GARLAND,  
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No. 423.

Chief of Chukchind, for 1899.

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No 423.

Brief of Hutchings for Appellee

U.S. SUPREME COURT  
FILED

FEB 13 1899

JAMES H. McKEE

SUPREME COURT OF THE UNITED STATES

Filed Feb. 13, 1899.

OCTOBER TERM, 1898.

No. 423.

WILLIAM STEPHENS ET ALs, APPELLANTS,

VS.

THE CHEROKEE NATION, APPELLEE.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY  
NORTHERN JUDICIAL DISTRICT.

BRIEF ON BEHALF OF APPELLEE.

By WILLIAM T. HUTCHINGS.

The Phoenix Printing Company, Muskogee, Ind. Ter.

# In the United States Court of Appeals

## FOR THE INDIAN TERRITORY.

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OCTOBER TERM, 1898.

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No. 423.

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VS.

THE CHEROKEE NATION.

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### BRIEF OF APPELLEE.

There have been set for hearing along with this case some sixty others involving much the same facts and principles. We shall, therefore, endeavor to make our argument cover, as far as possible, all the principles which should, in our opinion, govern the determination of all the cases.

#### I.

##### THE JURISDICTION OF THIS COURT.

The first question, therefore, that confronts us is what powers and jurisdiction were conferred upon this Court by the Act of Congress. It will be found in the Indian Appropriation Bill, approved July 1, 1898, *Public, No. 175, page 23*, and is as follows:

“Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases be-

tween either of the Five Civilized Tribes of the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: Provided, That appeals in cases decided prior to this Act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

While the language in this clause is not very clear, still no other construction can be put on it than that the only power that this Court has in the trial of these citizenship cases is to determine the constitutionality or validity of the legislation. It is true that it says appeals shall be allowed in all citizenship cases, but the rest of the sentence modifies that statement and gives to it quite a different meaning from what it would have did it stand alone. If the latter part of the sentence does not qualify the first part, it is then surplusage and without meaning. It cannot be practically applied to any case. But we are not left to determine this question to the language of the Act alone, but can, we think, with propriety, look to the history of the legislation itself and the general policy of Congress in conferring jurisdiction on this court. There were a number of amendments to the bill touching the subject of appeals in citizenship cases arising in the Five Civilized Tribes. In all of them except the one which passed finally, there was provision for a general appeal on the whole case, giving the court full jurisdiction to determine all the questions in the cases and to try them in fact *de novo*. We instance the following as an amendment proposed by the Senate to the Indian Appropriation Bill. (*H. R. 6896.*)

“That all parties to cases of application for citizenship in the several tribes in Indian Territory, including the several tribes, in which appeals were duly taken under act of Congress, approved June tenth, eighteen hundred and ninety-six, from the decision of the Commission to the Five Civilized Tribes to the United States Court, and which have been determined by said Court before the passage of this Act, may, within ninety days hereafter, appeal such cases to the Court of Appeals of said Territory; and parties to such cases which may hereafter so determined may, within sixty days from date of judgment, take such appeal; and from the decision of said Court of Appeals, appeals and writs of error shall in all cases be allowed to the Supreme Court of the United States.”

But this and none of the other amendments suggested, which were to unload this enormous work upon this court, were agreed to until finally the question was narrowed down to the consideration of the validity and constitutionality of the law which conferred upon the Dawes Commission the right to try the cases. This was in harmony with the previous Acts of Congress, especially in cases in which appeals are allowed direct to this court. The Appellate Court Act of March 3, 1891, Section 5, Sub-division 5, has this provision in enumerating the instances in which appeals or writs of error may be taken direct to this court: “In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.” Certainly no greater privileges should be given to a citizenship applicant than are given to the ordinary litigant who happened to have his property rights in litigation in the Federal Courts. This question, however, has not been raised in the assignments of error of more than two or three of the cases before this Court. It was raised in the United States Court and counsel for the appellee offered to confess the question and admit that the legislation was invalid. They, however, had asked too much and found themselves in the same predicament that they are in here. If the legislation is valid the cases must be

affirmed and they get nothing. If the legislation was invalid the cases go out for want of jurisdiction in the lower Court and they are in exactly the same position as before the passage of the law—non-citizens of the Cherokee Nation, with no tribunal to adjudge them otherwise, and with no power on the part of Congress to create one. Another reason which we think is potent in determining this question, is that most of the cases had already been disposed of and the judgments had become final prior to the passage of the law. If the law was invalid or unconstitutional claimants could still have come to this Court upon those questions by a writ of *certiorari*; so Congress considered it might as well permit them, under a general law, to do by appeal what they might have done in another way. The question was brought to the notice of the various committees and they could not, with the lights before them, have intended to do more than what it seems their language imports—the clothing of this Court with jurisdiction *solely* to investigate the constitutionality and validity of the law.

## II.

CONGRESS HAD NO POWER TO PASS A LAW GRANTING AN APPEAL  
FROM JUDGMENTS WHICH HAD BECOME FINAL  
BEFORE ITS PASSAGE.

The law under which the Dawes Commission decided the citizenship cases was approved June 10, 1896, and is as follows:

“That said commission is further authorized and directed to proceed at once and hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: Provided, however, that such application shall be made to such commission within three months after the passage of this Act.

“The said commission shall decide all such applications, within ninety days after the same shall be made.

“That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: And provided, further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said roll as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any person who may within three months from and after the passage of this Act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes of such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

“In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving such testimony are dead or are now residing beyond the limits of said Territory, and to use all fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this Act, it or he may appeal from such decision to the United States District Court: Provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.”

It will be seen then that not only was no further appeal provided for in that law, but it was unequivocally provided that the judgments of the United States Courts should be final. Technically speaking, there was really no appeal at all given from the Dawes Commission. The United States Courts in the Indian Territory are neither district nor circuit courts of the United States.

*Ex parte Mills*, 135 U. S., 263; L. Ed., 34, 107.

But by a most liberal construction and a good stretch, it was,

to carry out the badly expressed intention of Congress, decided to permit these appeals to the United States Court in the Indian Territory. Every case before this court today had been decided and a final judgment rendered therein prior to the passage of the law allowing appeals to this court. If that law professes to do more than we have contended for it is obviously unconstitutional and void. In the first place it would deprive the Cherokee Nation of the vested rights it had in those final judgments, and it would be an unjust encroachment of one department of our Government on another separate and distinct department, which cannot be lawfully done. (*U. S. vs. Klein*, 13 Wall, 128.) The legislature may alter and control remedies, but when the case has proceeded to judgment it has passed beyond its power. It has been uniformly held by all the courts of this country, with possibly two exceptions, that the legislature has no power to grant a new trial or direct a re-opening of a cause which has once been judicially settled, and that every such attempt is an invasion on the part of the legislature of the judicial power of the government and is therefore unconstitutional and void.

The Cherokee Nation, one of the parties to the controversy, is satisfied with the final judgments of the proper court of last resort as provided in the Act of June 10, 1896, which was the United States Court for the Northern District of the Indian Territory, which embraces the Cherokee Nation, and contends that Congress cannot disturb the rights acquired under these final decrees; that a legislative act cannot grant an appeal from a final decree of a court of record made prior to the enactment of such law, the decree having been made under an existing law, that made that decree final; that such law can only operate as to future cases—it cannot have a retroactive effect; that the judgment is essentially the property of the successful party, and he



cannot be subjected to the vexation, hazard, risk, and expense of another contest; that if these contentions were not true, the legislative branch of the Government would override the judiciary and there would be no stability or confidence in the finality of contests under this branch of the Government; that it would impair and divest vested rights.

*Rights secured by judgment cannot be divested.*

*Wade on Retroactive Laws, Sec. 172, page 203, says: "The rights secured to either party to a suit by an adjudication of the matter in controversy between them are proprietary rights which the Constitution will protect.*

*"The rights secured by the judgment are such as the law gives to the prevailing party when it is rendered. To materially enhance or diminish those rights is to work a deprivation of the rights of one or the other of the parties. In Atkinson vs. Dunlap, 50 Me., 111, notwithstanding a previous conflicting decision by the same court, it was held that a statute allowing previously adjudicated cases in which existing remedies had been exhausted, and the judgments had become final by the expiration of the time limited for appeals or reviews, was manifestly unconstitutional, citing 2 Me., 275, and 15 Pa., St. 18."*

*Contra, Henderson & Nashville R. Co. vs. Dickerson, 17 B. Mon., 177, the same author in the same section, 171, says, in discussing this case, that it "was decided prior to the adoption of the 14th amendment to the National Constitution, otherwise the objection might have been noticed that the re-opening of a controversy in which final judgment had been rendered amounted to a law depriving the judgment-creditor of property without due process of law. \* \* \* The eye of the Court seems to have been so firmly fixed upon the supposed hardships under which the failing party labored—of having no 'opportunity which other litigants had, to correct any errors that may have been committed'—that it overlooked the vicious principle which gave the legisla-*

ture plenary control over final judgments. If the constitutional provisions referred to were insufficient to protect judgments, final and conclusive, under the law as it existed at the time of their rendition, because there was no appeal, then they would be insufficient to secure the rights of judgment-creditors after affirmance by the court of last resort."

"Litigation would have no end so long as the legislature maintained the power to reopen a case in which possible errors may have been committed. 'The law of the land,' instead of being the law as it existed when the rights under it accrued, would mean nothing more permanent than the transient caprice of the legislature. These bodies ordinarily find sufficient occupation in correcting their own errors without undertaking to rectify those committed by the courts and juries. 'A judgment-creditor may by legislative tergiversation be kept out of his own for an indefinite period of time, and he will not be permitted to enforce his judgment until the legislature has grown tired of granting appeals to his adversary.'"

In *Hill vs. Sunderland*, 3 Vt., 570, "it was held that a legislative act giving the right of appeal from the decision of road commissioners was void, as applied to an award already made, under a law as it existed at a time."

"Legislature cannot interfere. The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how or for what cause, it cannot apply retrospectively to judgments already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would be an unwarranted invasion of the province of the judicial department."

*Black on Constitutional Prohibitions*, Sec. 197, pages 250, 251, 252, says:

"If the legislature cannot invade the province of the courts by imposing upon them, by a retroactive statute, the necessity of adopting a different interpretation of an existing law from that

which they had already placed upon it, it follows, *a fortiori*, that the legislature cannot directly control the action of the courts by setting aside their judgments or ordering a reconsideration of adjudications they have duly and formally reached. Hence an act of the legislature awarding a new trial in an action which has been decided in a court of law is unconstitutional. Thus it was said by Chief Justice Gibson: "If anything is self-evident in the structure of our Government, it is that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial, but the power of the legislature is not judicial. The legislature has gone no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest. Hence it will appear that a statute of this character is not only a practical assumption of judicial power, but also is obnoxious to the provisions which guard vested rights from invasion, and is therefore properly within our subject, and objectionable because of its retroactive effect upon past transactions."

Section 198, pages 252 and 253: "On the same principle it is held that the legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in a case where no such right existed when judgment was pronounced, or where the right has been definitely forfeited."

Section 199, page 253: "In accordance with the principles already announced, it is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date, impairs vested rights and infringes on the judicial department of the Government."

*Merrill vs. Sherburne*, 8 Amer. Dec., 52.

*Stanford vs. Barry*, 15 Amer. Dec., 691.

*Ratcliffe vs. Anderson*, 31 Gratt, 105; 31 Amer. Rep., 716.

*Willingsby vs. George*, 5 Colo., 80.

*Hewitt vs. Colorado Springs*, 5 Colo., 184.

*Burch vs. Newberry*, 10 N. Y., 374.

*Snyder vs. Palmer*, 32 Wis., 406.

*Denny vs. Matton*, 5 Allen, 379; 79 Amer. Dec., 784.

*Bush vs. Williams*, 24 Ark., 96.

*Martin vs. So. Salem Land*, No. 26, S. E., 591.

*Penn vs. Wheeling, etc., Bridge Co.*, 18 How. 421.

*Story vs. Runkle*, 32 Tex., 398.

*In Re Handley*, 49 Pac., 829.

1 Freeman on Judgments, Sec. 90.

Smith Stat. and Const. Law, Sec. 340.

6 Amer. and Eng. Enc. of Law, p. 1038, 2nd Ed.

In the case of *McCullough vs. Commonwealth of Virginia*, decided at the October 1898, term of this court, advanced sheets of Reporter No. 5, page 123, Mr. Justice Brewer, who delivered the opinion of the Court, makes this very clear statement of the law which we think has equal application to the legislation of Congress:

“But there are more substantial reason than this for not entertaining this motion. At the time the judgment was rendered in the circuit court of the city of Norfolk the Act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the court of appeals of the state brought the validity of that judgment into review, and the question presented to the court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.”

*Black's Constitutional Law*, page 259, Sec. 99, goes even further, and says:

\* \* \* “But a case which has been submitted for decision to a court of record is not subject to any control by the legislature.”

*Lanier vs. Gallatas*, 13 La., Ann. 175.

*Sutherland on the Statutory Construction*, p. 628, Sec. 480,  
is strong and conclusive:

“When a right has been perfected by a judgment, the fruits of recovery cannot be diverted by new legislation, nor subjected to new hazard by reviving a new right to appeal or some other mode of review.”

Congress can no more pass laws which have the effect of divesting vested rights than can the state legislatures.

This inhibition was imposed by the 5th Amendment to the Constitution, which declared that no person should be deprived of his property without due process of law.

*Wade on Retroactive Laws*, Secs. 156, 157, 264.

*Steamship Co. vs. Joliffe*, 2 Wall., 450.

*Fletcher vs. Peck*, 6 Cranch, 87.

*Memphis vs. U. S.*, 7 Otto, 293.

7 *Lawson's Rights and Remedies*, Sec. 3850.

*Black on Const. Prohibitions*, Secs. 176, 183, 207.

*Sutherland on Statutory Constructions*, Sec. 480.

3 *Amer. and Eng. Enc. of Law*, pp. 756-760,  
2nd Ed.

*The Society, etc., vs. New Haven*, 8 Wheat, 493.

*Wilkinson vs. Leland*, 2 Peters, 657.

*Ferguson vs. Williams*, 13 N. W. Rep., 49.

The cases of *Watson vs. Mercer*, 8 Pet., 88, and *Satterlee vs. Matthewson*, 2 Pet., 380, do not contravene this. These cases arose under State laws, and at the time they were decided there was no clause in the Constitution of the United States prohibiting the States from passing laws that had no other effect than to divest vested rights. No such decision would now be rendered since the 14th Amendment to the Constitution. Nor would any such have been made had the act under consideration in those

cases been passed by Congress, for it was forbidden as we have shown above, from passing laws divesting vested rights. In other words there was nothing in the act involved in these cases in violation of the Constitution of the United States as it then stood, and that was the only error the Court could pass on.

*Wade on Retroactive Laws, Sesc. 159, 191, 261.*

*What then is a vested right?*

Says the Supreme Court of the United States in *Steamship Co. vs. Joliffe, supra*:

“When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.”

*Wade in Sec. 157, page 190, of his Work on Retroactive Laws*, says: “Any right or thing which may be owned, bought, sold, or assigned may be considered as a vested right, in the sense that the owner cannot be deprived of it otherwise than by ‘due process of law’ or ‘the law of the land.’ Unless something answering the description of due process of law is required by a retrospective statute which authorizes the transfer of a private right from one person to another, this provision of the Constitution is clearly violated, whether the right arose in contract or not.”

It is thus defined by *Mr. Black, in Section 154, of his Work on Constitutional Law*: “Vested rights are rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of another private person, and which it is right and equitable that the Government should recognize and protect, as being lawful in them-

selves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. A vested right, as distinguished from an interest in expectancy or a contingent interest, is a right of action or property immediately fixed in some particular person or persons."

See also:

*Fletcher vs. Peck*, 6 Cranch, 87 L. Ed., 162, notes.

*Goshen vs. Stormington*, 10 Amer. Decs., 134.

*Lowe vs. Harris*, 17 S. E., 539.

*Grove vs. Todd*, 20 Amer. Rep., 79.

3 Amer. Eng. Enc. of Law, 758, 2nd Edition.

The matter involved in these cases was a share in the communal property of the Cherokee Nation, which consisted of land and money. The decision rendered in the cases deprives these claimants of any interest in that property adjudging the fact that they were not citizens of the Cherokee Nation, and could not share with the recognized citizens of said nation in its property. If any of these cases were tried upon their merits and reversed the necessary effect would be to take a citizen of the Cherokee Nation and give to these claimants, or such as were successful, a share of land and money which would otherwise be theirs, and which, under the judgment of the lower Court have been adjudicated theirs.

### III.

THE CASES WERE PROPERLY TRIED BELOW BY THE COURT.

It has been contended in some of the cases, and assigned as error in this court, that when they were brought to the United States Court below they should have been tried by a jury and not



by the Court sitting as a chancellor. This may be successfully answered by saying that no jury trials were ever requested in any of the cases; but it may be more successfully answered by stating that the law made such a trial improper. The law quoted above, giving the appeal, stated that the tribe or any person "May appeal from such decision to the United States Court." In the modern legislation of the various states the term appeal is used in different senses, and has, to a great extent, lost its distinctive meaning, but we believe in the legislation of Congress it never has. In such legislation it has always been understood in its technical sense as expressive of the civil law mode of removing a case to a higher tribunal and placing the case in the latter court to be tried *de novo* upon its merits.

*U. S. vs. Goodwin, 7 Cranch, 110.*

*U. S. vs. Tenbroeck, 2 Wheat, 248.*

*Noe vs. U. S., Hoffman Land Case, 242.*

#### IV.

##### SOME OF THE APPEALS NOT PERFECTED IN TIME.

In most of the laws passed by Congress as well as those passed by the various states the time prescribed within which appeals may be taken is complied with when the appeal is allowed. In other words, two, three or four months, as the case may be, is allowed within which to sue out an appeal or writ of error. The law regulating appeals in these cases, however, is very differently worded and reads as follows: "That appeals in cases decided prior to this Act must be perfected in 120 days from its passage, and any case decided subsequent thereto within sixty days from final judgment." All of the cases under consideration were decided prior to the Act, and the limit for perfecting the appeals

expired October 29, 1898. Now, certainly the appeal could not be perfected within that time without filing a transcript of the record in this court. But we believe that even more was necessary to perfect the appeal; that the docket fee must have been paid and the case actually put upon the docket of the court. Quite a number of these cases were filed in this court subsequent to October 29th, while there are at least some six or eight in which the appeals were not allowed in the lower Court until after that time. Surely these cases will be dismissed upon the inspection of the filing mark.

V.

WHAT CONSTITUTES A RIGHT TO CITIZENSHIP IN THE CHEROKEE NATION?

Of the thousands of cases which come before the Dawes Commission upon applications for enrollment as citizens of the Cherokee Nation, there were comparatively few in which the facts were seriously controverted. To the mind of counsel for the Cherokee Nation a proper determination of the law governing such cases, settled for itself, nine out of ten of such cases. The question therefore, and the main question which confronts us, was, what was the jurisdiction conferred upon the Dawes Commission, and what class of applications could properly be considered by them? Our position before the commission, and before the United States Court was, that they were sent to the Indian Territory by Congress, not to make citizens of the Cherokee Nation by naturalization, but to make a complete roll of all Cherokee citizens.

Everyone at all acquainted with the appointment of the commission knows that the extra jurisdiction conferred upon them by the Act of June 10, 1896, was obtained through the influence and

pressure of men who claimed to be Cherokee citizens, many of them having, as they alleged, been admitted to citizenship, and afterwards decitizenized by the authorities of the nation. Therefore, waiving for the present, any question of the power of Congress to confer upon the commission such judicial functions and jurisdiction, and assuming that the conferring of such powers was not in conflict with the constitution of the United States, or any treaty or contract heretofore made by the United States with the Cherokee Nation, we submit that the power conferred upon the commission by the act before mentioned, was simply to determine, who among the Cherokees are citizens of the nation, and ought to be so regarded, but who are denied the rights and privileges of such by said nation. Before, therefore, considering the question, we must discuss the whole question of Cherokee citizenship.

## VI.

### WHO ARE CITIZENS OF THE CHEROKEE NATION?

The Cherokee Nation, like most peoples in the initial period of their national life, had for its government a sort of common or unwritten law. This is recognized in all the treaties made with it, and all the laws of Congress passed for its government, and is designated "Usages and Customs." From its earliest existence, and before it had any written law, rights and immunities in the Cherokee Nation were incident exclusively to membership or citizenship in the nation. All the rights, privileges and immunities exercised by its members sprang exclusively from citizenship. There is no such a thing as a property right in the Cherokee Nation as apart from citizenship. Prior to the adoption of a written constitution, membership in, and permanent abode with the taibe, alone entitled one to share in the benefits of the property and annuities of the nation. In fact, up to a few years prior

to 1827 there had been little occasion to call in question the status of the Cherokee people as a nation. Then arose the great question of the right of the State of Georgia to extend its laws over the Cherokee Nation, and the further question, both in Georgia and North Carolina, of extinguishing the title to the Cherokee lands within the limits of those states. Therefore, at a general convention of delegates held at New Echota, July 26, 1827, a constitution was adopted for the nation predicated upon their assumed sovereignty and independence as a distinct nation. In this constitution was clearly defined who were entitled to citizenship, and what were the rights incident to the same, as will be seen by the extract below :

*“ Constitution of the Cherokee Nation Formed by a Convention of Delegates From the Several Districts, at New Echota, July, 1827.*

#### ARTICLE I.

“Sec. 2. The sovereignty and jurisdiction of this government shall extend over the country within the boundries above described, and the lands therein are, and shall remain, the common property of the nation; but the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: Provided, That the citizens of the nation, possessing exclusive and indefeasible right to their respective improvements, as expressed in this article, shall possess no right nor power to dispose of their improvements in any manner whatever to the United States, individual states, or individual citizens thereof; and that whenever any such citizen or citizens shall remove with their effects out of the limits of this nation, and become citizens of any other government, all their right and privileges as citizens of this nation shall cease: Provided nevertheless, That the legislature shall have power to re-admit by law to all the rights of citizenship, and such person or persons, who may at any time desire to return to the nation on their memorializing the General Council for such re-admission. Moreover, the legislature shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent the citizens from monopolizing improvements with a view of speculation.

#### ARTICLE II.

“Sec. 4. No person shall be eligible to a seat in the General

Council, but a free Cherokee male citizen, who shall have attained to the age of twenty-five years. The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of the Cherokee women by all free men."

The next Council which met also passed a law with reference to the rights of intermarried citizens which is as follows:

"Resolved by the National Committee and Council in General Council Convened, That from and after the passage of this Act, any person or persons, not citizens of the nation, who shall marry according to the law in this nation and lose by death a wife or husband as the case may be, and not having a child or children by him or her to whom so married, shall be deprived, and is thereby deprived of citizenship, by the death of the Cherokee citizen or citizens, that created his or her right, i. e., the right of the said white person or persons or any such, who has become citizens by marriage with any citizens of this nation.

"Be it further Resolved by the authority aforesaid, That any such citizen or citizens as aforesaid, who shall lose by death, a wife or husband, as the case may be, and have a living child, or children, the fruit of any marriage according to law, shall be and continue a citizen or citizens of the Cherokee Nation so long as they shall remain single or shall marry any other citizen of the nation again.

"Be it further Resolved by the aforesaid authority, That any such person or persons aforesaid who shall lose a wife or husband, as the case may be, by death, and have a child or children, the fruit of such lawful marriage, and shall marry a white person or persons of such as come into the nation, or any other by the law of marriage, shall upon and by such marriage aforesaid, destroy and nullify, his or her rights, as the case may be, who shall marry, to citizenship in this nation; and so long as he, she, or they of such persons aforesaid, shall remain in the country, shall be considered intruders upon the soil of the nation, and be liable to expulsion and removal from the nation according to the laws made and provided in such cases.

"Approved:

JOHN ROSS.

"New Echota, Oct. 15, 1829."

The constitution of 1827 was, of course, framed by the Eastern Cherokees, the United States Government at that time recognizing two branches of the Cherokee Nation, from each of

which accredited delegates were received in Washington, the other branch being the Old Settler or Western Cherokees, those who had from time to time since 1804 migrated west of the Mississippi and settled in Arkansas. By the treaty of 1835, and "The Act of Union Between the Eastern and Western Cherokees" entered into July 12, 1839, the two branches of the Cherokee Nation were again united. The constitution which followed that declaration of union provides:

"Sec. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: Provided, That the citizens of the nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United State, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, that the National Council shall have power to re-admit, by law, to all rights of citizenship, any such person or persons, who may, at any time, desire to return to the nation, on memorializing the National Council for readmission."

Such remained the law of the Cherokee Nation until the change of its constitution was necessitated by the changed conditions growing out of the treaty of 1866. Under the operation of that treaty, freedmen who had been former slaves of Cherokee citizens and free colored persons, under certain conditions, as well as certain registered Delawares and Shawnees, became incorporated into its body politic. On November 26, 1866, therefore, the Constitution of 1839 was amended to meet these changed conditions, and we find in *Section 5, of Amendments of Article 3, on page 33 of the Laws of the Cherokee Nation, 1892*, the following recognized classes of citizens:

"No person shall be eligible to a seat in the National Council

but a male citizen of the Cherokee Nation who shall have attained the age of twenty-five years, and who shall have been a *bona fide* resident of the district in which he may have resided, at least six months immediately preceding such election. All native born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have liberated by voluntary act of their former owners or by the law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be citizens of the Cherokee Nation.''

It will be seen all through this legislation that a special emphasis is put upon the requirements of permanent residence by its citizens in order to maintain their standing as such.

## VII.

### HOW CAN CITIZENSHIP BE LOST OR FORFEITED?

Any nation of people which possesses any of the elements of sovereignty has the inherent right to determine who shall be its citizens, who shall become its citizens and how such citizenship may be lost or forfeited. We have seen in the various provisions of the Constitution of the nation above set forth, that citizenship in the Cherokee Nation may be lost by abandonment by all classes and by remarriage on the part of the white adopted citizens, who may after the decease of the Indian wife or husband marry any person not having the rights of Cherokees by blood. (*Section 666, Cherokee Laws of 1892.*) This section was quoted and its legality approved in case of *Nofire vs. U. S.*, 164 U. S., 657. This loss by abandonment has been the common law of all Indian Nations, although prior to any written laws on the subject, a return to the nation and a declaration of the intention of a permanent residence with it, *ipso facto*, restored the prodigal to his rights of citizenship. The first written laws of the Cherokee Na-



tion were passed May 6, 1817. They were composed of six articles, the third of which was as follows:

“The authority and claim of our common property shall cease with the person or persons, who shall think proper to remove themselves without the limits of the Cherokee Nation.

“Approved May 6, 1817.”

Before ever this law assumed a written form, a large number of Cherokees, as mentioned above, were living on Arkansas public lands, and were receiving no share of the annuities and common funds of the nation, and did not, until the treaty of 1817 was made, when the nation proper consented to a division with them. And, even then, they did not receive any of the past annuities which, since their removal West, had been paid wholly to those of the nation who remained East, in accordance with their usages and customs. We see, then, from time immemorial, that this much talked of birthright in the Cherokee Nation was not a property or a vested right, but simply a right to citizenship which could be forfeited and regained in accordance with the laws of the nation whose subject the citizen was. An Indian may expatriate himself from the nation of which he is a subject as effectually as can the citizens of any other government upon the globe.

*Elk vs. Wilkins, 112 U. S., 94; 28 L. Ed., 643.*

In this case it was held that the Indian, Elk, was not a citizen of any government; that he had lost his citizenship in the tribe to which he had belonged, by abandonment; that he had not become a citizen of the United States because he had not been legally naturalized; that he stood in the position exactly of that great body of immigrants who have left their homes in foreign lands to come to America with a fixed purpose and declared intention of permanently abiding here, but have not yet become United States citizens by compliance with the naturalization laws of our land.

Mr. Justice Richardson, in *Eastern Band of Cherokees vs. United States*, 20 *Court of Claims*, page 474, said of those Cherokees who failed and refused to migrate West with the great body of their people under the treaty of 1835, but chose to remain East and identify themselves with the people of their irrelative states:

“They have expatriated themselves from the Cherokee Nation, and become denizens and subjects, if not citizens, of the states where they reside. Thomas, their agent and attorney, wrote that by the Constitution and laws of the state they had the right to vote, though they seldom exercised it, lest by identifying themselves with one political party they should give offense to the other. (*Ex. Doc. No. 298, last Session 29th Congress, page 181.*) Whatever organizations they subsequently effected must have been mere social organizations, with no power as an independent nation of their own to make laws or to do other national acts. That follows from their relation to the State of North Carolina.

“They were never afterwards recognized by the United States as any part of the Cherokee Nation, as a body politic.”

Even in the case of Elk, above, he having abandoned his tribe and married a citizen of the United States, having taken up his abode in the State of Nebraska, and made that state his domicile, his descendants, after that time, born in the State of Nebraska, would, beyond doubt, be citizens of the United States and of the State of Nebraska.

*Ex parte Reynolds*, 18 *Albany Law Journal*, 8;5  
*Dillon*, p. 396.

*Gee Fork*..... *vs. U. S.*, 1 *C. C. A.*, 211.

It is contended by our adversaries, however, that the right of Cherokee citizenship cannot be forfeited; that it is an inheritable right which children inherit from their fathers and mothers under some law of descent and distribution, and is not impaired by forfeiture of citizenship. They claim this principally by virtue of certain language made use of in several of the treaties made with the Cherokees, particularly that of 1817 and 1846, in which

occurs the expression, "The whole Cherokee Nation." The facts which gave rise to this expression in the treaty of 1817 were these: It had been the policy of the Federal Government from the beginning of its official relation with the Cherokees to encourage and assist the individuals of the nation in embracing the pursuits and habits of civilized life. Game was disappearing east of the Mississippi and they must become farmers and stock-raisers, with the alternative of starvation.

Considerable annual expenditures were made in the purchase for the Indians of agricultural and domestic implements. The result of this was that in the early part of the nineteenth century we find the Cherokee Nation divided into what was known as Upper and Lower, or "hunter" Cherokees, the former being cultivators of the soil and desirous of dividing their lands in severalty and becoming citizens of the United States, while the latter were addicted to hunter life, and indisposed to adopt civilized habits.

Propositions were advanced on the part of the Government as early as the 1st of May, 1808, when a delegation from the Upper Cherokees visited Washington, looking to a division of the territory between these two branches, and of remedying what was claimed at that time had been going on, an unequal distribution of annuities between the Upper and Lower Cherokees.

Early in February, 1809, President Jefferson had an interview with the representatives of the Lower Cherokees, and approved their plan of sending a delegation to visit the Arkansas and White river countries in search of a suitable location. A suitable location was found and a large number of Cherokees signified their willingness to remove, but the Government failed to make any appropriation for the payment of the expenses of

their removal. However, owing to their dissatisfaction with the terms of the treaty of 1785, a number of Cherokee families left the nation and formed a settlement in Louisiana, then a province of Spain, from whence in a few years they removed to a more satisfactory location on White river. Here they were joined from time to time by their Eastern brethren until, prior to the treaty of 1817, they numbered between two and three thousand souls. During all this time they neither received nor claimed any annuities, or other rights as Cherokees, but had carried with them, just as the common law follows every settlement or community of English speaking people as a heritage, the laws, customs and usages of their nation. They had never become citizens of, or identified with, any state, territory or other government, but had kept up their ancient organization and maintained the distinctive character of Cherokees; so that when the treaty of July 8, 1817, was negotiated (*U. S. Stat. at large, Vol. 87, p, 156*), the Government of the United States recognized them as a constituent part of the Cherokee Nation, and received as their accredited deputies John D. Chisholm and James Rogers, and the treaty with the joint contract with the three parties to it, to-wit: The United States and the representatives of the Cherokee Nation east of the Mississippi river, and those on the Arkansas river. It is therefore noticeable in the fourth section of said treaty that provision was made only for the future annuities to be divided between the Cherokees on the Arkansas. From that time on, there were two distinct branches of the Cherokee Nation, and under the treaty of 1817 the Cherokees continued to migrate to the Arkansas country. That state of affairs gave rise to the expression in the first place. A further sketch of their history from then on up to 1846 will clearly show its meaning as used in that treaty. Some of those who had consented under the treaty of 1819 to move to the

Arkansas country subsequently concluded to remain with the Eastern branch. These found themselves in an annoying position; the Government had recognized two separate branches of Cherokees and two sets of citizens. Their share of annuities was being paid under the treaty of 1819 to the Cherokees on the Arkansas and they were not even allowed to vote, hold office, or participate in any of the affairs of the nation East, they having abandoned by express contract all of their rights of citizenship in the original Cherokee Nation. The Government then held that they were not a part of the body politic of the nation proper, but must remove to Arkansas at their own expense. (*Instructions of the Secretary of War to Agent Meiggs, June 15, 1820.*)

Chief Justice Fuller said, in *U. S. vs. Old Settlers*, 148 U. S., 427:

“There are many documents in the *Record* indicative of the view of the Indian office that the Western Cherokees were only a contingently separate community from the Eastern body and were subject to increase by the immigration of those East; and that they did not have, as an independant community, any ownership of the land, or rights therein, except what belonged to them in common with the whole Cherokee people.”

So distinct were the two branches that in 1828 the Government concluded a treaty (*U. S. Stat. at Large, Vol. 7, page 311*,) with the chiefs and head men of the Cherokee Nation west of the Mississippi alone; yet the entirety of the nation was recognized in expressing that the purpose was to provide a home for the “whole Cherokee people,” including those East as well as those West.

The nation east of the Mississippi, as we have seen above, adopted its own constitution in 1827, and considered themselves no part of their brethren. The treaty of 1833 was also concluded with the Cherokees west of the Mississippi, recognizing them as in

the other treaty—an independent sovereignty of themselves. During all this time the Government, influenced by the importunities of the states east of the Mississippi to extinguish the title of the Cherokees to their lands situated there, was endeavoring to unite the two nations west of the Mississippi.

Sundry expedients were resorted to, both by the general Government and by the authorities of Georgia, to compel the acquiescence of the Eastern Cherokees in the demand for their emigration. The Government was declining to recognize in the nation any rights of sovereignty, and was taking every means to disabuse the Eastern Cherokees of any pretensions to such rights. On May 17, 1834, John Ross and his delegation presented to Congress a memorial setting forth the injuries done them, and we find as one of the complaints the following:

“ Heretofore until within the last four years, the money appropriated by Congress for annuities has been paid to the nation, by whom it was distributed and used for the benefit of the nation. And this method of payment was not only sanctioned by the usage of the Government of the United States, but was acceptable to the Cherokees. Yet, without any cause known to your memorialists, and contrary to their just expectations, the payment has been withheld for the period just mentioned, on the ground, then for the first time assumed, that the annuities were to be paid, not as hitherto, to the nation, but to the individual Cherokees, each his own small fraction, dividing the whole according to the members of the nation.”

It will thus be seen that the Cherokees had at all times considered the rights of the Cherokees as national and its nation as a sovereignty. And the Supreme Court, contrary to the ideas of President Jackson and his advisers, upheld this contention, though not erring it to the extent contended for by the Cherokees.

*Cherokee Nation vs. Georgia*, 5 Pet., 1; 8 L. Ed., 25.

*Holden vs. Joy*, 17 Wall., 211; 21 L. Ed., 523.

*Worcester vs. Georgia*, 5 Pet., 515; 8 L. Ed., 483.

Finally, however, the treaty of 1835 (*U. S. Stat. at Large*, Vol. 7, page 478,) provided for the removal of the Cherokee Nation East to the West. And on the 4th day of December, 1838, the last detachment of them marched for the West. A number, however, said to exceed about one thousand scattered through the mountains of North Carolina and Tennessee to avoid removal.

Upon the coming together of the body of the nation in their new country west of the Mississippi, they found themselves torn and distracted by party dissensions and bitterness almost beyond hope of reconciliation. The parties were respectively denominated:

1. "The 'Old Settler' party, composed of the Cherokees who had prior to the treaty of 1835 voluntarily removed west of the Mississippi, and who were living under a regular established form of government of their own.

2. "The 'Treaty' or 'Ridge' party, being that portion of the nation led by John Ridge, and who encouraged and approved the negotiation of the treaty of 1835.

3. "The 'Government' or 'Ross' party, comprising numerically a large majority of the nation, who followed in the lead of John Ross, for many years the principal chief of the nation, and who had been consistently and bitterly hostile to the treaty of 1835 and to the surrender of their territorial rights east of the Mississippi."

Upon the arrival of the emigrants in their new home, the Ross party insisted upon the adoption of a new system of government and a code of laws for the whole nation. To this the Old Settler party objected, and were supported by the Ridge party, claiming that the government and laws already adopted and in force among the Old Settlers should continue to be binding until the general election should take place in the following October,



when the newly elected legislature could enact such changes as wisdom and good policy should dictate. A general council of the whole nation was, however, called to meet at the new council house at Takuttokah, having in view a unification of interests and pacification of all animosities. The council lasted from the 10th to the 22d of June, but resulted in no agreement. Some six thousand Cherokees were present.

A convention summoned by John Ross and composed of his followers together with such members of the treaty and Old Settler parties as could be induced to participate, convened and remained in session at Tahlequah from the 6th to the 10th of September, 1839. This body adopted a constitution for the Cherokee Nation, which was subsequently accepted and adopted by the Old Settlers or Western Cherokees in council at Fort Gibson on the 26th of the following June, and an act of union was entered into between the two parties on that date.

This state of affairs gave rise to the treaty of 1846, at the making of which were representatives of the Cherokee Nation (known respectively as the Government party, the Treaty party and the Old Settler party). (*U. S. Stat. at large*, Vol. 9, p. 871.)

In this treaty occurs again the expression, "The whole Cherokee people." We have seen that each of the factions claimed to be the nation, and each was contending for supremacy. We see further that their differences were to be settled by this treaty, and that it was admitted by all that the three factions should constitute, without question thereafter, one Cherokee Nation.

There were no representatives of those Cherokees who had elected to remain east of the Mississippi, and none were included except those who had a right to claim citizenship in the Cherokee

Nation and had never abandoned the same. As was said by Chief Justice Richardson in *20 Court of Claims, 478*: "The claimant relies much upon the language of the first article of the treaty of 1846, securing the lands west of the 'whole Cherokee people, for their common use and benefit,' as giving the North Carolina Cherokees and the claimant band an interest therein whenever any part should be sold. Even independently of the contemporaneous construction by all parties, which strengthens our views, we have no doubt that the 'whole Cherokee people' there referred to were the three parties into which the Cherokee Nation was then divided by dissensions, and not by locality—first, the 'Eastern Cherokees,' meaning those who removed West after the treaty of 1835-36, and who constituted the 'Government party'; second, the 'Treaty party,' and third, the 'Old Settlers,' all mentioned in that treaty."

Again he says on *page 482*: "By the Constitution of 1827, made at New Echota, where was signed the treaty of 1835, it was decided that 'the sovereignty and jurisdiction of this Government shall extend over the country within the boundaries above described, and the lands therein are, and shall remain, the common property of the nation; Provided, that whenever any of such citizen or citizens shall remove, with their effects, out of the limits of this nation, and become citizens of any other government, all their rights and privileges as citizens of this nation shall cease.' (*Laws, etc., p. 119*). Again in the act of union between the Eastern and Western Cherokees signed by the president of the Eastern Cherokees, the president of the Western Cherokees, and by delegates and officers of each division, July 12, 1859, 'it was declared that all rights and title to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have been vested in either branch of the Cherokee family, whether inherited from our fathers or derived from other sources, shall henceforth vest entire and unimpaired in the Cherokee Nation, as constituted by the union.' (*Same volume of laws, etc., A. D. 1852, part 2, p. 1.*)

"The constitution which followed the above declaration of union provides, in Article 1, Section 2; 'The lands of the Cherokee Nation shall remain common property. Whenever any citizen shall remove, with his effects, out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease; Provided, neverthe-

less, that the national council shall have power to readmit, by law, to all the rights of citizenship, any person or persons who may, at any time, desire to return to the nation, on memorializing the national council for such readmission.'” (*Same volume, part 2, pp. 5, 6.*)

This question of citizenship has been considered a number of times recently by the Supreme Court, and the foregoing and other provisions of the Cherokee constitution relative to citizenship have been construed and upheld. The case cited from the Court of Claims was confirmed by this Court in *117 U. S., p. 288*, wherein it was held that those Cherokees who refused to accompany the body of Cherokees on their removal West thereby dissolved their connection with the Cherokee Nation and lost their citizenship. It was decided that they lost it by virtue of the provisions in the Cherokee constitution above quoted, the Cherokee Nation being, as decided, a body-politic in which the rights accruing to its members were rights of citizenship alone. These laws were further construed in the *Cherokee Nation vs. Journeyeake, 155 U. S., p. 196*. In this case Justice Brewer uses this language:

“But it must be borne in mind that the rights and interests which the native Cherokees had in the reservation and outlet sprang solely from citizenship in the Cherokee Nation, and that the grant of equal rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship.”

A distinguished member of the local bar in orally discussing this question in the court below, stated with the pride of discovery that “the lands of the Cherokee Nation are held in joint tenants and coparcenaries with each other.” Either he or Chief Justice Fuller is wrong, for the latter said, in *U. S. vs. Old Settlers, supra*: “The lands west of the Mississippi were held as communal property, not vested in the Cherokees as individuals, as tenants in common, or joint tenants.”

The laws of citizenship in the Cherokee Nation have received another construction in a recent case of *Nofire vs. U. S.*, *supra*, in which this Court recognizes and enforces them.

Among other things the Court says:

“Again, it is evident that Rutherford intended to change his nationality and become a Cherokee citizen. He took the steps which the statute prescribed and did, he supposed, all that was requisite therefor. He was marrying a Cherokee woman, and thus to a certain extent allying himself with the Cherokee Nation. He sought and obtained the license which was declared legally prerequisite to such marriage if he intended to become an adopted citizen of that nation. That he also obtained a marriage license from the United States authorities does not disprove this intention. It only shows that he did not intend that there should be any question anywhere, by any authority, as to the validity of his marriage. He asserted and was permitted to exercise the right of suffrage as a Cherokee citizen. Suppose, during his lifetime, the Cherokee Nation had asserted jurisdiction over him as an adopted citizen, would he not have been estopped from denying such citizenship? Has death changed the significance of his actions? The Cherokee Nation not only recognized the acts of young Dannenberg as the acts of the clerk, but since the death of Rutherford it has asserted its jurisdiction over the Cherokees who did the killing—a jurisdiction which is conditioned upon the fact that the party killed was a Cherokee citizen.

“It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and the Cherokee Nation in his lifetime recognized him as a citizen and still asserts his citizenship. Under those circumstances, we think it must be adjudged that he was a citizen by adoption, and consequently the jurisdiction over the offense charged herein is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of the nation.”

The Court not only uphold all the laws of the Cherokee Nation relating to citizenship and fully sustains its capacity to pass such laws, but further emphasizes the requirements under said laws, of permanent residence in the nation. The nation naturally passed such laws for self-preservation. We have seen in its history that its citizens had wandered off and formed themselves into

new bands, each claiming to be the rightfully constituted authority. The lands which were patented to them under the treaties are to revert to the United States if the Cherokee Nation becomes extinct or abandons the same. So, then, it was necessary to pass such laws as would best preserve its integrity and sovereignty. We have thus seen under the decisions of the Supreme Court of the United States that the public property of the Cherokee Nation is the same as similar property of any other nation.

Says Judge Field in *117 U. S., 288, supra*:

“The public property of a nation (referring to the Cherokee Nation) is supposed to be held for the common benefit of its people. Their individual interest is not separable.”

Again, he says in the same case, in passing on the rights of those Cherokees who, under the Constitution and laws, had abandoned the nation:

“Their claim, however, rests upon no solid foundation. The land, from the sale of which the proceeds were derived, belonged to the Cherokee Nation as a political body, and not to its individual members.”

The conclusion, therefore, is irresistible that those Cherokees who, at any time, have abandoned their tribal relation and have become citizens and residents of the United States or any other state, have lost all their rights of every kind in the Cherokee Nation, and can only regain them by the method hereinafter pointed out. Congress recognized this as true when, in *Section 43 of the Act of Congress of May 2, 1890*, enlarging the jurisdiction of the United States Court of the Indian Territory, it made provision for the naturalization by that court of any member of any tribe residing in the Indian Territory, as there was attached to that section the following:

“Provided, That the Indians who become citizens of the United States under the provisions of this Act do not forfeit or

lose any rights or privileges they enjoy, or are entitled to as members of the tribe or nation to which they belong."

In the Nofires case, above cited, the Court said that the citizen of the United States who became an adopted citizen by marriage to a Cherokee woman thereby changed his nationality.

### VIII.

#### HOW CAN CITIZENSHIP BE REGAINED?

After this citizenship has been lost it can only be regained in accordance with the laws of the Cherokee Nation in such cases provided; which is by petitioning the council of the nation for readmission. Such was the decision in the case of the Eastern band of the Cherokees by the Court of Claims and the Supreme Court of the United States, *supra*, in which it was decided that such Cherokees "must comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated by the constitution of the Cherokees and were intended, by the treaties of the United States, for the benefit of the united nation, and not in any respects for those who had separated from it and had become aliens to their nation."

The readmission by the council, of those who had forfeited citizenship, has always been a matter of grace on the part of the nation, and the various laws passed by the council delegating to courts and commissions its power to readmit to citizenship not only show this, but show that the Cherokee Nation never considered that because a man had Cherokee blood in his veins he could demand rights in the nation or exercise such rights unless

he was a recognized citizen of the same. After the nation moved West and occupied the country it at present occupies it became annoyed by a large class who claimed to be Cherokees by blood, and to have rights in the nation, but whose rights were disputed. Thus it was that the courts and commissions were empowered to try these cases and determine whether or not these claimants were citizens of the nation.

The jurisdiction originally conferred on them, we contend, was similar to that conferred upon the Dawes Commission, simply to determine the rights of, and enroll, such persons as were improperly denied the rights of citizenship, persons who had never forfeited their citizenship under the laws, but had done something to call their status in question. Later on such commissions were further empowered with the authority to readmit to citizenship. This, we respectfully submit, could not be legally done. We have seen by the decision above quoted that the courts of the United States construe the constitution of the Cherokee Nation as they construe the constitution of any state, and that the Cherokees themselves are as much bound by their organic law and can no more violate it, either through their legislature or otherwise, than the people of any state in this union can theirs. The constitution of the Cherokee Nation empowers the legislature to readmit to citizenship those who had abandoned the nation. That power rested alone with the council and could not be legally delegated to any court or commission.

*Cooley on Con. Limitations, 6 Ed. pp. 137 and 146.*

*State vs. Field, 17 Mo., p. 529.*

*Dougherty vs. Austin, 29, Pac., 1092.*

But if council did have this right, and any person applied to these various commissions and was denied citizenship, his case



must surely be tried here according to the law governing the commission to which he made his application, because it was under that invitation he came and applied. The first law which was passed in violation of such provisions of the constitution was as follows:

*“An Act Relating to Persons Returning to the Nation.*

“Be it enacted by the National Council: That all Cherokees, and other persons, having Cherokee privileges, who may have been residing out of the limits of the nation previously to the adoption of the constitution, are hereby exempted from being required to memorialize the National Council for admission to the rights and privileges of citizenship, it is considered that they have the right of returning without the action of the council.

“Tahlequah, October 15, 1841.”

Here arose the intruder question in the Cherokee Nation, as will be seen by the following acts of the council:

*“An Act Relative to the Right of Citizenship.*

“Be it enacted by the National Council: That all persons whatever, residing within the limits of this nation, whose rights to the enjoyment and privileges of citizenship is doubtful or disputed, be, and they are hereby required to appear before the National Council at its annual session in 1844, to establish the same, or otherwise be subject to removal from the country as intruders.

“Tahlequah, January 10, 1844.”

*“An Act to Amend an Act Relative to the Right of Citizenship Passed January 10, 1846.*

“Be it enacted by the National Council: That the President of the National Committee be, and he is hereby authorized and required to issue summons directed to the sheriffs of the several districts, requiring all persons now residing within the limits of this nation, whose rights to citizenship is doubtful or disputed, to appear before the National Council, on or before the first Monday in November next to establish the same, or otherwise be subject to a removal as intruders.

“Tahlequah, October 12, 1846.”

*“An Act Relative to the Improvements of Rejected Citizens.*

“Whereas; The National Council passed a resolution requiring all persons residing within the limits of the Cherokee Nation, whose right to citizenship was disputed or doubtful, to appear before the National Council on or before the first Monday in November, 1846, then and there to establish their right to citizen-

ship, or otherwise be subject to removal as intruders; and several of such doubtful citizens having failed to establish their right to Cherokee citizenship; Therefore,

“Be it enacted by the National Council: That all the improvements owned and occupied by such citizens as have failed to establish their right, be and the same are hereby declared to be public property of the Cherokee Nation, and all persons are hereby prohibited from locating on or purchasing said improvements from such rejected citizens.

“Tahlequah, November 11, 1846.”

This law of 1841 was repealed November 20, 1868, by the following Act:

*“An Act Repealing an Act Authorizing Persons to Move into the Cherokee Nation, Etc.*

“Be it enacted by the National Council: That the Act passed on the 15th of October, 1841, authorizing certain classes of persons to move into the Cherokee Nation without memorializing the National Council be, and the same is hereby repealed.

“Approved November 20, 1868.”

No person who applied before the commission, nor who have been bombarding the departments in years gone by, under claims of right to citizenship in the Cherokee Nation have claimed it under that Act. Therefore, it is of no importance in the consideration of these cases except to show the early violation of the Constitution by the council, and to show that the rights in the nation were at all times considered incident ~~to~~ citizenship.

On December 3, 1868, in an Act providing for the appointment of two persons as census takers, and requiring them to take a list also of all persons residing in the Cherokee Nation, not by law entitled to citizenship, the following provision was made for determining their rights:

“That all persons whose rights to citizenship in the Cherokee Nation shall be called in question and who shall be reported by the persons authorized by this Act to take a census of the Cherokee people, or list of doubtful persons, shall be required to appear before the Supreme Court of the Cherokee Nation, at Tahlequah, on the first Monday in December, 1870, then and there to establish their right to citizenship in the nation, and the said Supreme

Court is hereby specially empowered to act as a Court of Commissioners on behalf of the nation, for the hearing and determination of all cases of doubtful citizenship which shall be reported to them by the census takers, or by the solicitors of the several districts. And the decision of the said court shall be deemed final and conclusive in the premises as to the rights of said persons to citizenship in the Cherokee Nation. And the said court shall cause a correct list of the names and ages of all persons whose rights they may confirm; and one of all those whose rights they may reject, to be placed on record in their office and a copy of the same to be furnished to the Principal Chief for the use of the Executive Department.

“Approved December 3, 1869, the date of presentation.”

A casual examination of this law will show that the court was not empowered to readmit persons to citizenship in the Cherokee Nation, but as we have before said, to determine whether such persons residing in the nation, and claiming to be citizens, were in fact such. And if such court went outside of this, and admitted persons to citizenship who had come from the adjoining states, and who, though they had Cherokee blood in their veins, had domicile in the surrounding states and were citizens of the same and had at no time <sup>in the Cherokee Nation</sup> been citizens, it exceeded its jurisdiction.

In 1869 the Secretary of the Interior addressed a letter to the Chief of the Cherokee Nation, advising him of the poverty and want existing among the Cherokees residing in the State of North Carolina, and asking if the nation could not make some provisions for their removal West, and incorporation in the body-politic of the Cherokee Nation. Prior to the sale of the Cherokee strip, it had all along been the policy of the nation to welcome the return and readmission of the Indians remaining East, hoping thereby to successfully check the encroachments of that steadily growing band of intruders; and to better, by the increase in the number of admitted Cherokees by blood, preserve its autonomy and perpetuate its peculiar institutions. So a joint resolution was passed

December 10, 1869, inviting them to emigrate West, and thereafter at the next council the following Act was passed:

“Whereas, The National Council, under a joint resolution approved December 10, 1869, entitled ‘A joint resolution of the National Council in regard to the North Carolina Cherokees,’ has invited the said North Carolina Cherokees to emigrate West, and become identified with the Cherokee Nation as citizens thereof; therefore,

“Be it enacted by the National Council; That all such Cherokees as may hereafter remove into the Cherokee Nation and permanently locate therein as citizens thereof, shall be deemed as Cherokee citizens; Provided, said Cherokees shall enroll themselves before the Chief Justice of the Supreme Court within two months after their arrival in the Cherokee Nation, and make satisfactory showing to him of their being Cherokees. And the said Chief Justice is hereby required to report the number, names, ages and sex of all persons admitted by him to be entitled to Cherokee citizenship; and also the number, names, ages and sex of the persons denied the right of citizenship, to the annual session of the National Council in each year.

“Tahlequah, Cherokee Nation, November 18, 1870, approved.

“LEWIS DOWNING,

“Principal Chief of the Cherokee Nation.”

It is useless to say that no other persons except North Carolina Cherokees could come under the provision of the above Act. The discarding of technical requirements in their case was pardonable. The North Carolina Cherokees had kept up a sort of organization and a chief and other officers. They would come to the nation with proper certificates that they were Cherokees, and their identity could be easily proved. This power of enrolling these Cherokees was neither given to a court or commission, but the chief justice of the nation was made the enrolling officer. He was not acting in the capacity of a judge, because this he could not do alone, as the Supreme Court of the nation is composed of three judges, nor was he sitting in a judicial capacity at all, being a mere committee designated by the name of Chief Justice of the Supreme Court.

*United States vs. Ferriera, 13 Howard, 52.*

If, therefore, he enrolled any persons who were not North Carolina Cherokees, transcending his power, the enrollment was invalid and conferred no rights. The Chief Justice did transcend his power and enrolled people who were not North Carolina Cherokees, and in some instances upon evidence not considered very strong. So that the council in the following year amended the law as follows:

*“An Act to Amend an Act Approved November 18, 1870, Entitled ‘An Act Relative to the North Carolina Cherokees.’*

“Be it enacted by the National Council: That the Act approved November 17, 1870, entitled ‘An Act relative to the North Carolina Cherokees,’ be and the same is hereby so amended as to require the Chief Justice of the Cherokee Nation to receive and hear the petitions of all persons claiming the rights of Cherokee citizenship, and to take evidence with regard to the same, and to transmit the petitions of such petitioners with all the evidence relating thereto, with such remarks touching the merits of each petitioner as he may deem proper, to the National Council during the first week of each regular session, for final action; nor shall the power of said Chief Justice extend any further, than to receive the petitions and take evidence as aforesaid. \* \* \* He, the said Chief Justice, in acting in the premises aforesaid, shall be empowered and required to defend the interests of the Cherokee Nation, and in so doing, will be authorized to obtain all evidence possible to prevent the nation from any imposition, by any of such petitioners; and shall before entering upon the discharge of his duties aforesaid, take an oath to discharge the same faithfully.

“Be it further enacted: That for the purpose of executing this Act, said Chief Justice shall hold two sessions in each year, one during the month of April at Fort Gibson, and one at the town of Tahlequah in September, and he shall be allowed out of the general fund, while in actual service, \$5.00 per day; and shall have the right of employing a clerk whose pay shall be \$4.00 per day.

“Approved December 7, 1871.”

Under this law he could recommend to council and submit the evidence council required. A number of cases are before the court under the foregoing laws. All of them were citizens of adjoining states, none of them claiming to have been previously recognized citizens of the Cherokee Nation or North Carolina Cherokees.

We, therefore, submit that even if council had the power to delegate to commissions the authority to readmit citizens it did not delegate the power to the Chief Justice or Supreme Court to admit persons of the class above mentioned. To show that the right to readmission has never been by the Cherokee Nation considered one to be demanded at any time and as a matter of right, by any person in whose veins coursed Cherokee Indian blood, we cite the following Act passed shortly after the operations which followed the enactment of the laws which we have cited above:

“Be it enacted by the National Council: That all these persons who have, by special Act, or otherwise been readmitted to the rights and privileges of Cherokee citizenship, and who shall fail to return to the nation within six months from the date hereof—and thereafter identify themselves with the people of the Cherokee Nation by locating permanently, shall be barred such rights of citizenship, all provisions to the contrary notwithstanding.

“Be it further enacted: That the Principal Chief cause this Act to be published in the Cherokee Advocate for six months from date of passage for the information of those concerned.

“Approved November 28, 1873.”

This Act providing for the Chief Justice to take evidence in the case mentioned above was repealed December 5, 1876. We, therefore, see the North Carolina Cherokees are again shut out except by readmission by the council until further legislation. In the meantime, people are constantly coming from the states bordering on the Indian Territory and claiming rights in the nation. The Interior Department was flooded with appeals of rejected claimants, and both the United States and the Cherokee nation were endeavoring to devise some plan for the settlement of this vexatious problem. Upon the suggestion of the Interior Department, commissions were to be formed for the purpose. Carrying out this policy, a commission was provided, empowered with the following jurisdiction:

“The commission on citizenship shall have cognizance of, and

exercise complete jurisdiction over, all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship of said nation as hereinafter specified.

“ 1st. Of all cases wherein claimant to citizenship has applied to the Supreme Court, or to the National Council, and wherein the court or council has failed to adjudicate the same, whether it originated in the National Council or was transmitted thereto for review from the Supreme Court.

“ 2nd. Of all cases where the National Council has adjudicated the same by a decision adverse to claimants and where such rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States, subsequent to the date of the Cherokee treaty of July 19, 1866, and whose cases have been reported by the United States Agent under instructions from the Department of Interior to the Principal Chief and are now on file in this office.

“ 3rd. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

“ 4th. Of all cases where citizenship has been granted and there is presumptive evidence of fraud having been perpetrated to secure the same; or where citizens of the United States have married into this nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

“ 5th. Of all cases of persons of African descent arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the requirements of the treaty but has failed to receive recognition as a citizen by competent authority.”

“ In decreeing the right to citizenship in the Cherokee Nation the commission shall be governed by the provision contained in the *Fifth Section, Amendments to Article 3, of the Constitution*, to-wit: ‘ All native born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation,’ and in addition thereto shall include all applicants *bona fide* residents, and who are of Cherokee parentage, and who may be of not less than the half blood. The recognition of the right of citizenship in the Cherokee Nation, by virtue of the



foregoing provisions, shall not be deemed as conferring the like right upon any person not an Indian who may be connected by such person by blood or affinity, unless such person shall comply with the provisions of *Article 15, Chapter 10, New Code*, relating to intermarriages.

“The commission on citizenship may admit as evidence in any of the cases named herein the oral testimony of witnesses under oath, the decisions, records, or other papers, or the certified copies thereof in the clerk’s office of the National Council, or of the Supreme Court of the Cherokee Nation, or other affidavits taken before any court of record in the United States, duly authenticated, pertaining to any case brought before it under this Act, and shall give such weight as to the credibility of such evidence in making up their judgments thereon as they may deem it entitled to. They may in their discretion limit the number of witnesses that may be introduced to establish the same fact in any one case, and fix the period for hearing and determining the same.”

We have given <sup>jurisdiction</sup> jurisdiction, as we have said before, under the contention that if the claimant complained that he was entitled to citizenship under an Act because he applied under it and was wrongfully denied, he must bring himself, strictly within its provisions, for these commissions were appointed at the behest of the Government for their exclusive benefit.

As before stated, when these commissions were first instituted it was for the sole purpose of trying the rights of persons who claimed to be actual citizens of the nation, and were residents of the same. This is further shown by the following amendment to the Act creating the commission above mentioned:

“Be it enacted by the National Council: That an Act approved December 5, 1877, entitled ‘An Act creating a commission on citizenship to try and settle claims to citizenship,’ be, and the same is hereby amended so as to extend the jurisdiction of the commission on citizenship to embrace and extend to the cases of all claimants to the rights of citizenship, who may at the passage of the Act, be actually residing within the limits of the nation and whose cases have not heretofore been determined adversely to the claimants by the present commission.

“Sec. 2. Be it further enacted: That the Principal Chief be authorized and requested to direct the solicitors of the several

districts to report by the 1st day of January, 1879, or as soon thereafter as practicable, to the commission on citizenship, the names of all persons who allege that they have claims to Cherokee citizenship and who are now residing in their respective districts.

“Sec. 3. Be it further enacted: That the commission on citizenship shall expire on the 30th day of June, 1879, and shall then report their proceedings to the Principal Chief, for the information of the National Council, and shall turn over to the Executive Department all their records.

“Approved December 5, 1878.”

The commission created above went out of existence by limitation and another was created November 20, 1879. Its jurisdiction was as follows:

“They shall also have the right to command the presence and services of the sheriff of Tahlequah District, or his deputy, during their sessions; who shall be allowed one dollar per day while attending the sessions of the commission on citizenship separate from his salary. The said sheriff shall have authority to send summons to the several sheriffs of the several districts to be served without delay by them, and returned, without any other compensation than that of their salaries.

“The commission on citizenship shall have cognizance of and exercise complete jurisdiction over all cases arising under the constitution and laws of the Cherokee Nation involving the right to citizenship of said nation as hereinafter specified.

“1st. Wherein a claimant to citizenship has applied to the late commission on citizenship and no final action taken, or to the National Council since the expiration of the commission on citizenship, or where application for citizenship may be made to the National Council prior to the first meeting of the commission on citizenship herein created.

“2nd. Of all cases where the National Council has adjudicated the same by a decision adverse to the claimants, and where said rejected claimants have appealed from the jurisdiction of the Cherokee Nation to that of the United States, subsequent to the date of the Cherokee treaty of July 19, 1866, and whose cases have been reported by the United States Agent under instructions from the Department of the Interior to the Principal Chief, and are now on file in this office, and which have not been investigated and final decision given by the late commission on citizenship.

“3rd. Of all cases where the claimants have ignored the authorities of the Cherokee Nation and appealed to those of the United States.

“4th. Of all cases where citizens of the United States have married into this nation in violation of the law prohibiting the marriage of persons previously married without having obtained a divorce.

“6th. Of all cases of claimants petitioning for citizenship not embraced in the foregoing classification of claimants.

“7th. Of all cases of persons of African descent, arising under the Cherokee treaty of July 19, 1866, where the applicant claims to have complied with the treaty, but failed to have received recognition as a citizen of competent authority.

“In decreeing the right to citizenship in the Cherokee Nation the commission shall be governed by the provisions contained in the 5th section, amendments to article 3rd of the constitution. The recognition of the right of citizenship in the Cherokee Nation, by virtue of the foregoing provisions, shall not be deemed as conferring the like right upon any person not an Indian who may be connected with such person by blood or affinity, unless such person shall comply with the provisions of *Article 15, Chapter 10, New Revised Code*, relating to intermarriage.

“The commission on citizenship may admit as evidence in any of the cases herein named the oral testimony of witnesses under oath, the decisions, records, or other papers, or certified copies thereof, in the clerk's office of the National Council or the Supreme Court of the Cherokee Nation, duly authenticated, pertaining to any case brought before it under this Act; and shall give such weight as to the credibility of such evidence, in making up their judgment thereon as they may deem it entitled to.

“They may, in their discretion, limit the number of witnesses that may be introduced to establish the same fact in any one case, and fix the period for hearing and determining the same.”

The law providing for the aforesaid commission was repealed November 26, 1884, and on December 8, 1886, a third one was appointed, whose powers went further than those conferred on any of the others and encroached plainly upon the provisions of the constitution as to citizenship. Its jurisdiction was as follows:

“Sec. 7. The commission, when organized, shall give a hearing to any person applying for citizenship in the Cherokee Nation upon the ground of Cherokee blood or descent, but such applicant must be a person, or the lineal descendant of a person, whose name appears on the census rolls of the Cherokees taken by the United States after the treaty of 1835, and known as the rolls

of 1835, and the roll of 1848, known as the 'Mullay Rolls,' and the census rolls of the Cherokees taken by the United States in 1851, and known as the 'Sila Roll,' and the census rolls of the Cherokees taken by the United States in 1852, known as the 'Chapman Rolls,' and the commission shall decide in accordance with the constitution of the Cherokee Nation, conferring upon the National Council the power to readmit persons to citizenship, and with the opinion of the Supreme Court of the United States, delivered March 1, 1885, in the case of the *North Carolina Cherokees vs. the Cherokee Nation*."

This jurisdiction embraces all sorts of Cherokees by blood except the "Old Settlers," who were provided for by an amendment May 23, 1887. The existence of this commission was extended by an Act of December 5, 1888, but mainly for the purpose of completing the unfinished work, and its power expired by limitation the second Monday in November, 1889. The Act, however, provided that the persons admitted by the commission should become *bona fide* residents of the nation within one year from the date of their admission.

On December, 1894, was passed the last Act of the Cherokee Council in regard to citizenship, and is as follows:

"Be it enacted by the National Council: That all persons who have been or may hereinafter be readmitted to citizenship in the Cherokee Nation, are hereby required to permanently locate within the limits of the Cherokee Nation within six months from the passage of this Act, or, from the date of readmission of persons hereafter readmitted, or no rights whatever shall accrue to such persons by reason of such readmission; Provided, that nothing in this Act shall bar minors and orphans.

"Approved December 4, 1894."

There are not a great many contested cases under these last Acts, and of course the main question in such cases is, did the applicants bring themselves within the jurisdiction of the commission and make proof of Cherokee blood required by the Act. It is contended by our adversaries that the decisions of such commissions admitting persons to citizenship are binding upon the nation

and are valid judgments in favor of the parties admitted. If their jurisdiction was properly conferred under the constitution of the Cherokee Nation, that is unquestionably true. No less, however, is the opposite true. If the judgment in their favor was valid and binding and not to be set aside except as other judgments of courts of record in the states are set aside, so must the judgment rendered against such applicants.

Some stress has been put on an opinion rendered by Attorney General Garland on the Act of 1870, with relation to North Carolina Cherokees in response to inquiries by the Secretary of the Interior relative to persons enrolled by the Chief Justice under that Act.

*19 Opinions of Attorney Generals, p. 229.*

His reply was in part as follows:

“In answer to the first question propounded, I beg leave to say that, a North Carolina Cherokee removed into the Cherokee Nation, as stated in such question, and who made proof, as therein named, was thereby fully invested with the rights, privileges and immunities of Cherokee citizenship. This was a species of naturalization resorted to by the legislature of the Cherokee Nation in 1870, and would stand to that extent, precisely as a judgment of a court under an Act of Congress conferring citizenship in the United States upon a foreigner or an alien, and closes all inquiry, and like every other judgment, is complete evidence of its own validity. (*Spratt vs. Spratt, 4 Pet., 406.*)

“Or to state it a little more broadly, a judgment in this proceeding by the Chief Justice of the Supreme Court of the Cherokee Nation was in the exercise of a special jurisdiction conferred upon him, and comes within that familiar rule, that when a special tribunal is authorized to hear and determine certain matters, its decisions within the scope of its authority are conclusive.”

He further says in the course of his opinion, “that the proper construction of this Act is, that the judgment of the Chief Justice rendered according to the terms of such Act is the final determination and leaves nothing to review.”

To this we heartily assent, but suppose the judgment was not rendered according to the terms of such Act, what binding force has it then? This opinion was asked as a matter of fact in the case of parties who not only themselves were never in the State of North Carolina, but whose ancestors were never there and who had resided for more than a generation, west of the Mississippi, and at that time apart from the Cherokee Nation, and as recognized citizens of the United States, and who were in fact admitted by the Supreme Court under the Act of 1869.

Mr. Garland, in his opinion, recognizes this well established principle of law, that there must be an end to litigation, and this wholesome rule applies to all decisions of those courts, as well those admitting persons as those denying them.

To show further that the Indians considered this matter of citizenship a right, which if lost, was to be gained only by readmission under the constitution, we here insert several Acts of the council admitting persons who had forfeited their citizenship. These were selected at random and hundreds similar to them could readily be furnished:

*“An Act to Readmit to Cherokee Citizenship Certain Persons Herein Named.*

“Be it enacted by the National Council: That Alexander Cochran and (his) wife, Annie Cochran, and their children, Jessie Cochran, Martin Cochran, Lizzie Cochran, Turner Cochran and Aggie, a stepdaughter of the aforesaid Alexander Cochran, he and they are hereby readmitted to all the rights and privileges of Cherokee citizenship.

“Approved November 27, 1879.”

*“An Act Readmitting A. G. Greenway, a White Man, and His Two Children, Alonzo and Minnie Greenway, to Citizenship.*

“Be it enacted by the National Council: That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and they are hereby readmitted to the rights and privileges of citizens of the Cherokee Nation; Provided, that the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation.

“Approved November 29, 1878.”

“ *An Act Readmitting David N. Allen to the Rights of Citizenship.*

“ Be it enacted by the National Council: That David N. Allen, Mary Allen and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens. (Concurred in by council with the following amendment:) Provided, that David N. Allen, the petitioner, shall not acquire any rights except such as attach to white men, adopted citizens of (the) Cherokee Nation.

“ Approved December 3, 1878.”

## IX.

WHAT CLASS OF CASES THEN COULD THE COMMISSION LEGALLY CONSIDER?

In determining the meaning and intent of any law properly, we must necessarily consider the circumstances and conditions surrounding its passage. Who procured its passage, what evil it was intended to remedy, or what good to accomplish? The law creating the Dawes Commission was passed in the light of the decision in the case of the Eastern band of Cherokees, which decided that all Cherokees who had abandoned the nation under the provisions of its constitution were debarred from participation in the benefits of the treaties. We know that since that decision the department refused to consider the right to remain in the nation of any person who came in thereafter; and that, in considering the position of those who had come in previous, and who had *prima facie* certificates (hereafter explained), it was never claimed that the United States Government had the right to admit or readmit persons to Cherokee citizenship, but only to determine whether or not, upon application by the authorities of the Cherokee Nation, they could investigate the merits of the case, and determine for themselves whether or not the claimant should be removed by governmental authority under Sections 25 and 27 of the treaty of 1866. In other words, the Government maintained the right of determining whether he was a *bona fide* citizen, and



of not permitting such to be deprived of his rights, and not of admitting professed non-citizens to citizenship. It is now only exercising the same right maintained.

No persons outside of the Territory to speak of were seeking the aid of the department to gain citizenship for them.

It was an organized band of persons residing in the Cherokee Nation, which had grown to such proportions that they had organized an association under the title of "Cherokee Indian Citizenship Association." As an evidence of their contention as to who are entitled to the rights of citizenship, we quote below the language used by their president, W. J. Watts, in a little pamphlet compiled by him in 1895, with the intention, as he announced, "of placing before the public, facts as they exist in the Cherokee Nation in relation to citizenship since 1870." The quotation, we believe shows at least that he, presumably the exponent of the views of the association, did not contend that those who had abandoned the tribe and nation to become denizens of the states of the Union were eligible to the benefits accorded to *bona fide* citizens of the Cherokee Nation. We quote from page 142 of that pamphlet:

"This was the origin of the Eastern Cherokees, a term later dignified by the conferring of a corporate existence upon them by the State of North Carolina, and the ruling of the United States courts, that they were not eligible to benefits accruing to the main body of the tribe who had emigrated West. They were much scattered at that time and badly disheartened; but the census of 1890 shows that this branch of a great Indian tribe has certainly taken new life upon itself. Thrown upon their own resources, these Indians have developed a sturdy self-reliance entirely at variance with the accepted idea of the Indian, and are industrious, self-supporting, tax-paying citizens and voters. North Carolina claiming 1,520 of them, Georgia 936, Tennessee 318, and Alabama 111."

Congress certainly did not intend the commission to take the place of the National Council in naturalizing citizens. It certainly

never intended to reinstate the decendants of those who, by its solemn contract embodied in the treaty of 1835, it had disfranchised, and to trample upon the laws of the Cherokee Nation whose force and validity had been upheld by the highest court in the land. We submit, therefore, that their mission was to sit in judgment upon two classes of claimants, to-wit :

First: THOSE WHO CLAIMED THAT THEY NEVER HAD ABANDONED THE NATION AND HAVE ALWAYS BEEN CITIZENS UNDER THE TERMS OF THE CONSTITUTION.

Second: THOSE WHO CONTENDED THAT THEY HAD COMPLIED WITH THE LAWS AND CUSTOMS OF THE NATION IN SEEKING READMISSION AND (PARTICULARLY SO) IN APPLYING TO SOME ONE OF THE VARIOUS COMMISSIONS ON CITIZENSHIP WITHIN WHOSE RULES AND JURISDICTION THEY HAD BROUGHT THEMSELVES, AND HAD BEEN UNJUSTLY AND ILLEGALLY REJECTED AND DENIED READMISSION.

In support of these propositions we submit the following reasons :

(a) *Congress could confer no other jurisdiction on the commission without expressly repealing existing treaties.* Upon this point we quote in full the opinion of J. R. Hall, Assistant Attorney General, which gives the position that the Government held prior to what is known as the Strip Agreement, to which we will hereafter make more extended reference.

“ Department of the Interior,  
“ Office of Assistant Attorney General,  
“ WASHINGTON, July 16, 1894.

“ *John O. Cobb et al vs. The Cherokee Nation.* Alleged Cherokee Citizenship.

“ The Secretary of the Interior:

“ SIR: The claimants in this case are John O. Cobb, who married Eudora Moffet; S. H. Payne, who married Martha A. Moffet, and Dr. Moses Bell, who married Sarah Jane Moffet.

These men claim right to citizenship by reason of intermarriage with women of Cherokee blood.

“The three women named Eudora, Martha A. and Sarah Jane, were sisters and claimed to be Cherokees by blood. They were admitted to citizenship by the Supreme Court of the Cherokee Nation in 1870 and 1871. Afterwards it was determined by the Adair Commission that the decree of Supreme Court was obtained by fraud, and on December 7, 1877, the National Council passed an Act declaring these parties and their families to be intruders, and directing their removal.

“The parties entered what may be styled appeals to the department from this action of the Cherokee authorities.

“These several appeals have been submitted to me for examination and report as to the correctness of the findings of the Cherokee authorities whereby these appellants were declared to be intruders in the Cherokee Nation.

“Council for the Cherokee Nation insist that the Department of the Interior has no jurisdiction of this matter, and in support of that contention have filed an elaborate argument. They cite, first, the decision of the United States Supreme Court in *Volume 117, U. S., page 288*, known as the ‘Cherokee Trust Funds Case,’ in which the Supreme Court held that the Cherokee Nation had the exclusive right of determining the question of citizenship within the Cherokee Nation. Counsel also cite the first article of agreement made between the United States and the Cherokee Nation, dated December 19, 1891, and approved by Congress March 3, 1893, the first paragraph of which is as follows:

“First. That all persons now residents, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or Act of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of Section 6 of the treaty of 1835, and Sections 26 and 27 of the treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation.’

“Prior to the approval of this agreement by Congress, the department had held uniformly that it had the power to look into the question of alleged citizenship in the Cherokee Nation, in order to determine whether persons alleged to be intruders by the

Cherokee Nation should or should not be forcibly ejected therefrom by the United States authorities. The department acted upon the opinion given by Mr. Attorney General Devens. (*16 Op.*, 404.) That opinion was based upon the treaties of 1835 and 1866 between the United States and the Cherokee Nation. Those treaties obligated the United States Government to protect the Indians in the Cherokee Nation against intruders and to remove them therefrom.

“ While the department recognized the right of the Cherokee Nation under these treaties to determine who were not citizens of that nation, yet, acting upon the opinion of Attorney General Devens, the department claimed the right to be satisfied that a person found to be an intruder by the authorities of the Cherokee Nation was in fact an intruder, before he would be forcibly ejected. This ruling was adopted and followed by the department, because neither the treaty of 1835 nor that of 1866 provided that the United States Government should accept as a final decision by the authorities of the Cherokee Nation on the question of citizenship, and act thereon on the demand of the constituted authorities of said nation. It will be seen, however, that the agreement of 1891, approved March 3rd, does provide that no one shall be a citizen of the Cherokee Nation unless he is recognized as such by the constituted authorities thereof, and that all persons not so recognized shall be deemed and held as intruders and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States as trespassers upon the demand of the Principal Chief of the Cherokee Nation. Thus it will be seen, by the terms of this agreement, the Cherokee Nation is to be the sole judge of the right of any person to citizenship within that nation, and that when a person is declared not to be a citizen, but an intruder, he shall be ejected therefrom by the United States authorities on demand of the Principal Chief of the Cherokee Nation.

“ Where it is claimed by one who is declared by the Cherokee Nation to be an intruder, that he falls within some one of the exceptions contained in the first paragraph or Article 2 above quoted, then it would be the duty of the department to inquire and determine whether or not such person comes within the exceptions found in said paragraph. The exceptions are as follows: ‘ Persons in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation in conformity with the laws thereof, or in the employment of the United States government, or citizens of the United States who are resident in the Cherokee Nation under provisions of treaty or acts of Congress.’ Where the claim of a person is simply that he is a citizen of the Cherokee Nation, and that question has been decided against him by the constituted authorities of said nation, then the depart-

ment has no right, in my opinion, to inquire into the correctness of the decision of that question, because the constituted authorities of the Cherokee Nation are to be the sole judges of such questions, and the plain and simple duty of the United States government is to remove such person as an intruder on demand of the Principal Chief of the Cherokee Nation.

“No one of the appellants in the cases now before me claims to come within either of the exceptions set forth in this paragraph of Article 2, but all claim to be ‘citizens of the Cherokee Nation.’ ‘The constituted authorities’ of the Cherokee Nation do not recognize their claim, and I advise that the department has no jurisdiction to inquire into the correctness or propriety of the determination made in these cases by the authorities of the Cherokee Nation.

“The papers submitted to me are herewith returned.

Very respectfully,

JOHN I. HALL,

Assistant Attorney General.

“Approved:

HOKE SMITH, Secretary.”

T. J. Morgan, Commissioner of Indian Affairs, in discussing that same agreement in a letter to John W. Noble, Secretary of Interior, and referring to Articles 26 and 27 of the treaty of 1866, and more particularly to Article 5, of the treaty of 1835, gives the following as the law governing his department at that time:

“This provision operated as a guarantee of the right of self-government. One of the highest prerogatives of a government is the right to declare who are citizens, and the Supreme Court in the case of the Eastern band of Cherokees, etc., ( *117 U. S. Reports*, 288 ), declared in effect that this right of self-government which has been secured to the Cherokee Nation gave that nation the right to determine who are entitled to citizenship therein.

“Since the conclusion of the treaty of 1835 it has been the clear obligation of the government of the United States to protect the Cherokees against ‘interruptions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory.’ This obligation was renewed in the treaty of 1866, and is binding to-day.”

It seems that prior to the opinion of Attorney General Devens, referred to in Judge Hall’s decision the Department of Justice held to the idea that the treaties with the Cherokees were

not with the authorities of the Cherokee Nation, but with the Cherokee people, by which the Government was bound in the execution thereof to see that every individual member of the tribe was fully protected in his rights, and that the Cherokees, wherever they resided, were to be regarded as Cherokee citizens with an indefeasible vested interest in the property and funds of that nation. But that opinion received a severe shock by the decision in *117 U. S., 288*, and though it had been considerably modified in 1879 by Attorney General Devens, who took the stand that the United States had no right to admit to citizenship, but claimed that the United States in putting out intruders would override the Cherokees to decide whether or not the person was an intruder. The following is a quotation from his opinion:

“That it is quite plain that in executing such treaties the United States are not bound to regard simply the Cherokee law and its construction by the council of the nation, but that any department required to remove alleged intruders must determine for itself under the general law of the land the existence and extent of the exigency upon which such requisition is founded.”

After that opinion the agent of the five civilized tribes was instructed not to remove, as intruders, parties who claimed citizenship and produced *prima facie* evidence of their right to remain in the nation. The practical operation of that instruction was to retain in the nation any person who claimed, and could prove by any sort or shadow of evidence that he was a descendant of the Cherokees. The life of the instruction may best be seen in the following quotation from another letter from Commissioner Morgan to the Secretary of Interior relative to the Strip Agreement:

“By authority of this letter and of another of November 8, 1881, in which these instructions were substantially repeated, Agent Tufts instituted the practice of issuing certificates to all claimants to citizenship in the Cherokee Nation who could prove a *prima facie* just claim.”

“In December, 1885, the Cherokee Council adopted an Act

‘to create a joint commission on citizenship to try and settle the claims to Cherokee citizenship,’ which authorized the appointment of two persons by the Principal Chief of the Cherokee Nation and one by the Secretary of the Interior, who were to constitute the said joint commission.

“This Act was, by a letter of February 1, 1886, from Principal Chief Bushyhead, submitted for the consideration and opinion of the department, he having withheld his approval of the same for the purpose of having it approved by the department before indorsing it; but, pending its consideration by this office, the Supreme Court of the United States rendered a decision in the ‘Eastern band of the Cherokee Indians against the United States and the Cherokee Nation, (117 U. S., 288), in which it was held that ‘if the Indians in that state (North Carolina), or in any other state east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided.’

“It appears that after the decision of the Supreme Court in the case above referred to was rendered, Chief Bushyhead concluded not to approve the Act providing for a joint commission, but under date of April 3, 1886, addressed a letter to the department, requesting, among other things, that the right of the Cherokee Nation, under her constitution and laws, to determine who are and who are not citizens of said nation, be recognized, and that an order be issued revoking the instructions contained in letters of July 20, 1880, and November 8, 1881, to Agent Tufts, and forbidding the issuance of *prima facie* certificates thereafter.

“Since the conclusion of the treaty of 1835 it has been the clear obligation of the Government of the United States to protect the Cherokees against ‘interruptions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their Territory.’ This obligation was renewed in the treaty of 1866, and is binding to-day.”

Assistant Attorney General George H. Shields, a lawyer well known and of high standing in our country, February 25, 1892, also addressed the Secretary of the Interior, an opinion in regard to the Strip Agreement, in which he says:

“Under the treaties the right of self-government has been guaranteed to the Cherokee Nation, provided they passed no laws in conflict with the constitution and laws of the United States. The Supreme Court of the United States has recognized this status



of the nation and decided in effect that no one is entitled to become a citizen thereof unless he complies with the constitution and laws of the nation and is admitted to citizenship thereunder. (*Eastern Cherokees vs. United States*, 117 U. S., 288, 311.)

“ In these views the executive departments of the Government have concurred. But when demand has been made by the Cherokee authorities for the removal of those whom they asserted were intruders this department, whilst disclaiming the right to determine who shall become citizens of the Indian Nation, has insisted, under the advice of the Attorney General (16 *Ops.*, 404), that it was incumbent upon the United States first to ascertain whether the alleged intruders were such in fact and in law. And if, upon investigation, it was found that those parties were, in the opinion of the United States authorities, entitled to citizenship, but had been unjustly deprived of or refused their rights, then to decline to remove them. Further than this, it has been insisted by the Indian office that, where it was determined parties were such intruders and ought to be removed, they should have ample time in which to garner or dispose of their crops and improvements upon the lands they occupied, and because the Indians were not willing to pay these parties what were considered proper prices for said improvements, bad faith was charged and the removals were not made. See letter of Commissioner of Indian Affairs, February 17, 1880, herewith.

“ More might be said to show how it is that from one cause or another, rightfully or wrongfully, the treaty stipulations have not been carried out, but on the contrary, the Indians claim that the number of intruders have gradually increased, until their presence and arrogance has become intolerable to the Indians, a menace to their peace and prosperity, and a defiance to their laws and authorities.”

Again, in the light of these views, commissioners on the part of the United States entered into an agreement for the sale and possession of certain lands belonging to the Cherokee Nation, and commonly known as the “ Cherokee Strip.” In the second article of that agreement was inserted the following provision :

“ First. That all persons now resident, or who may hereafter become residents of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation, or in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the

provisions of treaty or acts of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section 6 of treaty of 1835, and sections 26 and 27 of the treaty of July 18, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation. In such removal no houses, barns, outbuildings, fences, orchards, growing crops, or other chattels real, being attached to the soil and belonging to the Cherokee Nation, the owner of the land, shall be removed, damaged, or destroyed, unless it shall become necessary in order to effect the removal of such intruders; Provided, That nothing in this section shall be construed as to affect in any manner the rights of any persons in the Cherokee Nation under the ninth article of the treaty of July 19, 1866."

Now, did the United States intend to violate the provision of that treaty in this matter? It is an elementary rule of construction that if a new law can be harmonized with those existing before its enactment it will be construed so as not invalidate either. In the new law it is expressly provided that said commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes.

(b.) *The history of claimant legislation shows that true.*

We have seen above that in the Strip Agreement the United States had promised to remove every person whom the Cherokee Nation should decide was not entitled to citizenship. Claimants, however, came in and said that certain of them, under *prima facie* certificates, had made large improvements in good faith prior to the decision of this court above mentioned. Owing to their importunities on that line, before the Strip Agreement was approved by the law March 3, 1894, this qualification touching the particular clause quoted above was inserted:

"And provided further; That before any intruder or unauthorized person occupying houses, lands or improvements which occupancy commenced before the 11th day of August, A. D. 1896,

shall be removed therefrom, upon the demand of the Principal Chief or otherwise, the value of his improvements, as the same shall be appraised by a board of three appraisers to be appointed by the President of the United States, one of the same upon the recommendation of the Principal Chief of the Cherokee Nation, for that purpose, shall be paid to him by the Cherokee Nation; and upon such payment such improvements shall become the property of the Cherokee Nation: Provided, that the amount so paid for said improvements shall not exceed the sum of \$250,000."

This would seem to have settled the citizenship question in the Cherokee Nation for all time, that being apparently the principal thing contended for by the intruders. These were the parties who had been contending for their rights, and these were the ones that the agreement was endeavoring to protect as is shown again by the remarks of Commissioner Morgan, whose objection to the bill without such provision, was successfully urged. He says the "Cherokees have denied citizenship to these parties who appear to have accepted the invitations offered and entered the nation in good faith, believing they had rights there by blood, and who have always had in their power, by co-operation with this department, to determine the question of the intrusion of these claimants, and to secure the removal of all actual intruders from the nation, but who have uniformly and persistently declined to accept any plan for the settlement of the matter, which would not give the said authorities complete control of the question."

The only parties, therefore, according to the philanthropic views of that eminent divine, who needed protection, were protected. In executing that provision, however, a large number of those claimants refused absolutely to take pay for their improvements although appraised by the legally authorized appointees. They found 91 places aggregating in value \$68,645.36. Of this sum \$39,541.90 was accepted, while the sum of \$29,103.46, al-

though tendered in legal money of the United States, was refused. The number thus refusing composed nearly 40 heads of families. This raised a new issue and Congress was besieged by a strong lobby not to put these people out until their cases could be passed upon by some disinterested and impartial tribunal. They reiterated the plea urged in their behalf by Commissioner Morgan that they had come in good faith in compliance with invitations given by the constituted authorities of the Cherokee Nation. This was further backed up by instances of Cherokees by blood who claimed that they had never in their lives been outside the Cherokee Nation, but whose names had been dropped from the rolls, and others who claimed to have been lawfully admitted but had been denied their right.

We below give samples of such character of cases taken from pages 67 to 73, inclusive, of the little volume heretofore referred to, by W. J. Watts, the wily and resourceful President of the Cherokee Citizenship Association, which was printed in 1895, and strewn broadcast in the department and among the members of Congress in Washington prior to the passage of the Act creating the commission:

*“ Case of Mrs. Rachel Edwards:*

*“ Cherokee Nation, Sequoyah District.*

*“ On this day personally appeared before me, W. J. Watts, a Notary Public, in and for the Northern Division of the Indian Territory, Rachel Edwards, who on oath states:*

*“ I am about 65 years old. My post office address is Muldrow, Indian Territory. I am a Cherokee woman. I was born in the old nation, East, and was moved in the Cherokee Nation by the United States Government in 1836, as well as I can remember. I have lived in this nation from that time to this date.*

*“ My first husband was Moses Edwards, a prominent Cherokee citizen from which there was no issue, Edwards soon dying after the war. Some years later I was married to a United States citizen—a white man named Thompson. We couldn't get along peaceably together, hence I was divorced under the Cherokee law.*

“My rights have never been brought in question until the census taker of my district reported me as being doubtful. Their plan of making Cherokees doubtful was to make a red mark opposite the name. This was in 1893.

“On September 5th, I made application to a merchant at Muldrow for credit on the strength of my strip money. The merchant, to satisfy himself of my being a legal Cherokee citizen, wrote to the Executive Department of the Cherokee Nation to ascertain the true facts and was furnished with the following certificate:

“Executive Department, Cherokee Nation,

“TAHLEQUAH, IND. TER., September 5, 1893.

“I hereby certify that the name of Rachel Edwards, female, appears on the census rolls of 1880, Schedule I, census of Sequoyah District, Cherokee Nation, as a native Cherokee by blood.

R. T. HANKS,

(Seal). Ass't Exec. Sec'y, Northern Div. Ind. Ter.  
November 12, 1895.

“I, W. J. Watts, Notary Public, within and for Muldrow, I. T., do certify that the above certificate is a true copy of the original, as is now in possession of Mrs. Rachel Edwards.

(Seal). W. J. WATTS, Notary Public.”

“On the assurance of the Strip money I secured credit of something over \$100. When the Treasurer of the Cherokee Nation was paying the Cherokee *pro rata* share of the Strip money I applied for my money. Their excuse was that I was marked ‘doubtful’ and that I would have to appear before the Cherokee Council and be reinstated before I could get my Strip money. I went before the council in 1894. After pleading with the members to place my name on the property roll I was treated with contempt, and couldn’t secure any action for or against my case. There are many others in the same condition to-day. I make this statement to show the injustice that is being done to citizens of the Cherokee Nation by people of their own blood.

“Gentlemen of the Dawes Commission: If within the scope of your authority, make such recommendations to the government of the United States as will correct this great wrong, which is being practiced by those in authority in the Cherokee Nation, your petitioner will ever pray.

Attest: T. F. ANDREWS,  
RACHEL EDWARDS.

“Sworn and subscribed before me, W. J. Watts, Notary Public within and for Muldrow, Northern Division, Indian Territory, November 12, 1895.

W. J. WATTS, Notary Public.”

“ *Case of Mrs. E. M. Black :*

“ MULDROW, I. T., December 1, 1895.

“ To His Excellency, the President of the United State of America, Washington, D. C. :

“ Permit me to say that I am a Cherokee woman, deriving my Cherokee blood from my grandmother, Cerena Sevier, a half-breed Cherokee, who married Andrew Culwell, a white man.

“ My mother, Elizabeth Culwell, who was a daughter of said Andrew and Cerena Culwell, married John C. Jackson. I married William P. Black, September 1, 1867, in Hunt County, Texas. Since our marriage there have been five children born to us.

“ We moved to the Cherokee Nation and filed my claim in compliance with the laws of the Cherokee Nation and myself and five children were readmitted to citizenship in the Cherokee Nation by the Adair court, which right we have enjoyed until we incurred the displeasure of some official.”

CERTIFICATE OF ADMISSION TO CHEROKEE CITIZENSHIP.

“ Office of Commission on Citizenship,

“ Tahlequah, Cherokee Nation.

“ To all whom it may concern—Greeting:

“ This is to certify that the following named, to-wit: Eliza M. Black, and her five children, Dora L., Forrest C., J. Elliott, Kennie D., and Delia M., ages respectively, viz.: 44, 17, 11, 9, 8, 7, did, pursuant to the provisions of an Act of the National Council of the Cherokee Nation, approved December 8, 1886, entitled: ‘ An Act Providing for the Appointment of a Commission to Try and Determine Applications for Cherokee Citizenship,’ make such application to and before said commission on the 20th day of September, 1887; that the proof submitted by the above named applicants in support of their said application has been heard and is hereby declared and certified to be sufficient and satisfactory to the said commission according to the requirements of Section 7 of said Act of the National Council, and that by virtue of such finding of fact by the commission, and in conformity with the fourteenth section of said Act, the above parties ( applicants for citizenship ) are from this date of said finding and decision of the said commission announced and recorded, readmitted by the National Council, as provided in said fourteenth section, to the rights and privileges of Citizenship, under Section 2, Article 1, of the Constitution of the Cherokee Nation; and this certificate of said decision of the commission and of readmission by council is made and furnished to the said parties accordingly.

“ In witness whereof, I hereunto sign my name, as chairman of the commission, on this, the 22nd day of September, 1888.

J. T. ADAIR,

( Seal ).

Chairman Com. on Citizenship.

“Attest: CONNELL ROGERS,

Clerk Com. on Citizenship.

“Approved and endorsed, J. B. MAYES,  
Principal Chief Cherokee Nation.

“HENRY EFFIERT,  
Assist. Ex-Sec. Cherokee Nation.”

SHIPPER'S PERMIT.

“Cherokee Nation, Cooweescoowee District,  
Office of Clerk.

“WHEREAS, E. M. Black has petitioned this office for a permit to ship prairie hay beyond the limits of the Cherokee Nation.

“Now therefore, I, A. H. Trott, Clerk of the Cooweescoowee District, Cherokee Nation, by virtue of authority in me by law, empower, authorize and permit E. M. Black, a citizen of the Cherokee Nation, to ship, transport or carry beyond the limits of the Cherokee Nation, prairie hay cut in Cooweescoowee District in the years 1891 and 1892. The said E. M. Black being subject to and required to comply with the conditions of the Act of the National Council, approved December 2, 1889, entitled, ‘An Act to Protect the Public Domain, and for the purpose of revenue.’

“In testimony whereof I hereunto set my hand and affix the seal of my office on the 27th day of June, one thousand eight hundred and ninety-two.

H. H. TROTT,

Clerk Cooweescoowee District, Cherokee Nation.

By W. H. DREW, Deputy.”

MONTHLY STATEMENT.

“Of prairie hay shipped or sold by..... of....., I. T., during the month of..... 189....., tons and..... lbs. subject to a tax of 20 cents per ton, amounting to..... dollars and..... cents.

“Sworn to and subscribed before me on this, the..... day of..... 189.....

Clerk Cooweescoowee District, C. N.”

“To H. Trott, Clerk Cooweescoowee District, C. N.:

“Received of E. M. Black \$6.00 to apply on permit to employ David Belmire to labor as a farmer within this district for the term of 11 months from date, January 1, 1892; expires January 1, 1893.

F. METZNER,

Special Deputy Clerk, C. D., C. N.”

It is useless to discuss these cases more than to say that Mrs. E. M. Black was before the court as an applicant, and the certificate of admission set out above is the boldest forgery that human eyes ever rested upon; she evidently purchased it from some per-



son who rightfully owned it, and scratched out the original names and inserted those of herself and descendants. The other was falsely personating a dead Cherokee woman of the same name.

It is true that Mrs. Black applied before one of the commissions in the Cherokee Nation about that time. Her case was fully considered, and a judgment rendered against her, all of which is of record in the Executive Department at Tablequah and certified transcripts of it were placed before the Dawes Commission, who rejected her. She also appealed from their decision to the United States Court, which affirmed the decision of the Commission to the Five Civilized Tribes.

We know that the Government of the United States is preparing to allot the land among the citizens of the Cherokee Nation, and in pursuance of that avowed intention the commission was sent to the Indian Territory to make a correct roll of Cherokee *citizens*, these parties contending that the tribunals of the nations were unfair, partial and prejudiced, and that they had no way of establishing the fact that they were *bona fide* citizens.

Under the Act confirming the Strip Agreement the intruders were to be removed within a certain fixed time. Upon the plea of such as we have mentioned above, this was delayed from time to time upon various specious pretexts. The Government at length determined that it would fall back on its rights as formerly maintained under the opinion of Attorney General Devens, and send down a fair and impartial tribunal, one having no axe to grind in any nation, to determine whether or not those persons were, or ought legally to be considered, citizens of the Cherokee Nation.

Senator Platt, during the discussion in the Senate of the proposition to confer the power on the commission, said:

“We are told that we have nothing to say about who are citi-

zens there; that the 500 men who have thus usurped the power can decitizenize all the rest of the Indians, and we have nothing to say about it; that this Government has relinquished to the people who, through bribery and corruption and fear, control the tribes, to whoever may be in control the right to determine who are citizens there. If we have we had better regain it, and the more quickly the better, for the 500 people who own the land, who control the courts, who control the legislatures, will very soon be solving the question, if they have the unlimited power, by wiping off from the rolls of citizenship all the rest of the people there. The argument of the Senator from Wisconsin ( Mr. Vilas ) goes to that extent that whoever can control the courts and the legislature of those nations can determine the rights of the people claiming to be citizens, and it has been done.

“ When the great payment of \$6,000,000, which we gave for the Cherokee Outlet, was made, name after name of persons who had been upon the rolls as citizens was deliberately and corruptly wiped off in order that there might be a larger per capita distribution for the rest. Pitiable indeed is the condition of those Indians, for whom we are in honor bound to look out, if they are to be left to the tender mercies of those who control the courts and the legislature in those nations. No, Mr. President, there rests behind all treaties, there rests behind all statutes, there rests behind all decisions of the Court of Claims and of the Supreme Court the solemn obligation on the part of the Government to protect the Indians in the Indian Territory, and there is no protection possible for them unless we are to assume the right to determine who are the rightful citizens of the Territory.”

The conclusion is, therefore, irresistible that the commission came to determine who among the Cherokees were to be put out of this nation as intruders instead of who on the outside should be put in as citizens.

( c ) *The wording of the bill itself proves our contention.* It provides that “ any person who shall claim to be added to said roll as a citizen of either of said tribes, and whose right thereto has either been denied or <sup>not</sup> acted upon, or any citizen who may, within three months from and after passage of this Act, desire such citizenship, may apply,” etc.

( d ) *The previously expressed opinions of the commission as*

at first constituted confirms it. It is an open secret that members of it were in Washington at the time the bill was before Congress, and that its provisions were largely dictated by them.

In an address sent out by them to the Five Civilized Tribes, February 12, 1894, in speaking of this vexed question, they made the following statement :

“ Another question of great moment to the Indian is who is to decide what persons are entitled to allotment. There are many thousands who are claiming this right, and if Congress shall make provision by law to divide your land, it will also make provision for a tribunal to settle the question who are allottees, wholly independent of your tribal governments.

“ Some among you claim that this right belongs exclusively to the different tribes, and that it has been so decided by the Supreme Court in the case of *Eastern Band of Cherokee Indians vs. United States*, 117 U. S. Supreme Court Reports, page 880. Upon examination it will be seen that the question there decided was, that as the Eastern Cherokees had abandoned their membership in the Cherokee Nation, and voluntarily ceased to be members of it, and become citizens of the United States, that they had lost all their tribal rights, which could not be restored except by the Cherokee Nation admitting them again to membership. But it is not there decided that the Cherokee Nation has the sole right to determine the question as to membership in the tribe of a person of Cherokee blood, who claims as a matter of fact that he has never abandoned membership in the tribe, and has not thereby lost his right to share in the lands and money of the tribe.”

( e ) *Justice and fair dealing exclude any other construction.*

## IX.

COULD CONGRESS LEGALLY CONFER UPON THE DAWES COMMISSION ANY POWER TO CONSIDER THE QUESTION OF CITIZENSHIP IN THE CHEROKEE NATION ?

We waive the discussion of the question as to whether or not Congress could confer judicial power upon a commission whose original duties were exclusively administrative, though we think the point well taken.

*People vs. Chase, ( Ill. ) 36 L. Reps. Ann., 105.*

Were we to do so and succeed upon this question alone, we would be left in the position of confessing that Congress might do rightfully what it had done wrongfully. If the Government has the power to create any commission to pass on questions of citizenship in the Cherokee Nation, it could not appoint one better fitted, more conscientious or painstaking than the one which has just about closed its labors. It would be remarkable if they have not made some mistakes for the nation as well as against it, so great was the task imposed upon them, and so short the time within which to execute it. The comparatively few cases appealed on either side evidences the esteem in which their decisions are generally held.

We have seen that the Attorney General for the Interior Department gave his opinion that the Supreme Court of the United States had held that the Cherokee Nation was the sole arbiter in the determination of questions of citizenship arising among its members. Other distinguished lawyers have held likewise. We know that a treaty is but a law and may be repealed as any other law—just that far and no farther. If the treaty gives a vested right, that right can no more be disturbed by the repeal of the treaty than a similar right created by any other law.

But the Strip Agreement has placed the Cherokee Nation upon even more solid ground than that. We have before seen that in that agreement one of the very considerations for the transfer was the guarantee of the right to the nation to determine for itself who were entitled to citizenship. It was more a consideration to the Cherokees than the actual money paid them. We are aware that there is nothing in the Constitution which forbids Congress from passing laws which impair the obligation of contracts. But it is further true that Congress has no power to pass

any law except in pursuance of some express power in the Constitution. And any law made otherwise which necessarily, and in its direct operation, impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

*Davis vs. Gray*, 83 U. S., 203; L. Ed., 457.

*Hepburn vs. Griswold*, 8 Wall., 603.

*Mitchell vs. Clark*, 110 U. S., 633.

Contracts, however, made by the Government itself stand upon a different footing, and the United States are as much bound by their contracts as individuals. They lay down their constitutional authority in such cases and have only the same rights, and are subject to same obligations as individuals.

*Southern Pa. R. Co. vs. United States*, 28 Ct. Cl., 77.

*I. Story on Constitution*, Sec. 1130.

*Fowler vs. United States*, 3 Ct. Cl., 43.

*United States vs. Bostwick*, 94 U. S., 53.

During the consideration of this question before the Senate, Senator Vilas made an unanswerable argument on this phase of the law, and though many speeches were made by Senators, not one attempted to reply to him. So conclusive is it of the question in hand, that we give an extended extract from it:

“ Mr. President, a question has been raised as to what the law now is in regard to the right to determine citizenship in any one of the Five Civilized Tribes. The Senator from Connecticut (Mr. Platt) rather surprised me yesterday by saying that he did not recognize the right under the present state of treaty and law to exist in the several tribes themselves. It is enough for the purpose of showing that the amendment, were it enacted into law, would revolutionize the present treaty condition, to show that one of those people, the Cherokee people, is now protected, beyond the least question or doubt, by the most explicit stipulations. I should like to correct, if I am right, and if the statement was

somewhat erroneous which the Senator from Arkansas made, that view of it which he submitted. The question did not become important under the treaties which established autonomous government of those civilized tribes for a long time after those treaties were made.

“The treaty of 1835, by which the Cherokee Nation was established, or by which the former treaty made with them in 1829, was given its durable form, provided explicitly that the Cherokees on their part should endeavor to preserve and maintain the peace of the country and not to make war upon others, while in consideration of that it was added immediately:

“‘They shall also be protected against interruption and intrusion from citizens of the United States who may attempt to settle in the country without their consent.’

“That was the origin of the intruder question and of the difficulties which have arisen in respect to the subject. That was practically reaffirmed in the treaty of 1866, and there was little need for a considerable time for enforcement of that agreement on the part of the United States. Little or no claim was made by either of the nations or by the Cherokees until the settlement of the West began to expose their borders to intrusion from lawless persons, individuals who disregarded every sort of right and every sort of obligation which the United States had imposed upon their citizens. It happened at last that one of those nations claimed the exercise on the part of the United States of this guaranty to protect them from intrusion. Then Attorney General Devens gave it as an opinion that the United States were at liberty to decide, when asked to expel an intruder, whether or not the person was an intruder, whether or not he could be regarded by the constituted authorities of this government as entitled to participate in their citizenship or to remain in their country. After that opinion was announced, the Supreme Court, in the case to which I referred yesterday, which is known as the Cherokee Trust Fund case, arising out of claims of the Eastern Cherokees to participate in the funds of the nation, etc., decided as stated in the first head-note of that case, that—

“‘By treaties with the Cherokees the United States have recognized them as a distinct political community, so far independent as to justify and require negotiations with them in that character.’”

There followed in the discussion of that case the further question of the right of the Eastern Cherokees to participate as citizens in the funds and property of the Cherokee Nation domiciled and settled in the Indian Territory, and to which as a nation

a patent had granted the right of ownership of their lands in common, upon whatever implied trust need not be discussed. The Supreme Court said then, that—

“ ‘The claim presented by the Cherokees of North Carolina, to a share of the commuted annuity fund of \$214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting as it does upon the designation in the treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States as ‘the common property of the nation,’ or as he held for the ‘common use and benefit’ of the Cherokee people, has no substantial foundation.’ ”

“ ‘Then follows what they add as the reason for that :

“ ‘If the Indians in that state, or in any other state east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the Constitution and laws of the Cherokee Nation, and be readmitted to citizenship as there provided.’ ”

“ ‘In other words, the Supreme Court of the United States declared, what to a lawyer was obvious without that declaration, it seems to me, that the Constitution and laws of that independent and political community were the sole touchstone of the right to citizenship within that community. After that decision, which was made subsequent, indeed, to the ruling of Attorney General Devens, the case was heard at the October term, 1885. After that decision, the Department of the Interior always regarded that the right to decide upon the status of a claimant to citizenship in one of those Five Civilized Tribes was exclusively vested in the lawful authority of the tribes, to be determined by the Constitution and the laws of the tribes. That decision was made by the honorable Senator from Colorado ( Mr. Teller ) a little before, even, when he was Secretary of the Interior. It was afterwards followed by others in that office, and I myself had occasion, when occupying that office, to render a similar decision, although I insisted that when a person had been allowed to enter the lands of a tribe and remain there for years while the question of citizenship was depending undetermined by its authorities, if they suffered him so to delay, and while delaying to accumulate property and interests, that there remained in him a right which the Government should protect, however tenuous that right was; that a final decision of the question against his claim of citizenship should be accompanied with sufficient accord to him of privilege to dispose of his property without taking it from him.’ ”



Mr. George: "Still their decision would be final."

Mr. Vilas: "Their decision was so recognized in the department in a case to which I refer — the Kusterman case. The fact that they had found him to be no citizen was considered as controlling the department upon that point. That has been ever since the ruling of the department, as I understand it."

"But a few years ago Congress established a commission to deal with this same nation for the extinguishment of the title, whatever it was, whether to use or otherwise of a large body of land, exceeding 6,000,000 acres in quantity, called the Cherokee Strip."

Mr. Jones of Arkansas: "The Cherokee Outlet."

Mr. Vilas: "The Cherokee Outlet, sometimes called the Cherokee Strip. That commission made a bargain with those Indians by which after long resistance on their part, and great reluctance to part with their title, they did finally agree to transfer it to the United States upon certain considerations. One was a consideration of money, but others upon which they insisted with the greatest pertinacity were considerations of another character. They were left with their original patented lands in their possession, but for the protection of their government and exclusive enjoyment of those patented lands they made this stipulation in the treaty then agreed to —"

Mr. George: "Concerning the Outlet?"

Mr. Vilas: "Concerning the Outlet."

"For and in consideration of the above cession and relinquishment, (begins Article 2, the cession being made in Article 1) the United States agrees:

"First: That all persons now resident, or who may hereafter be come residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, —"

Mr. Jones of Arkansas: "That has no relation to citizenship. That was the question about intruders."

Mr. Vilas: "I will repeat that, in order to answer by its own terms the suggestion of the Senator from Arkansas, which I think was rather hastily made:

"For and in consideration of the above cession and relinquishment, the United States agrees:

"First: That all persons now resident, or who may hereafter become residents, in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation, by the constituted

authorities thereof, and who are not in the employment of the Cherokee Nation or in the employment of citizens of the Cherokee Nation, in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not resident in the Cherokee Nation under the provisions of treaty or acts of Congress, shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of Section 6 of the Treaty of 1835, and Sections 26 and 27 of the Treaty of July 19, 1866, and shall, together with their personal effects, be removed without delay from the limits of said nation by the United States, as trespassers, upon the demand of the Principal Chief of the Cherokee Nation.' "

Mr. George: "What is the date of that agreement?"

Mr. Vilas: "I will give it. That agreement was signed by the commissioners at Tahlequah, in the Indian Territory, on the 19th day of December, 1891, and was approved by the law of March 3, 1893, with this qualification touching the particular clause in question:

" 'Amend the same by adding to the first paragraph of Article 2 of said agreement the following words: And Provided further: That before any intruder or unauthorized person occupying houses, lands or improvements, which occupancy commenced before the 11th day of August, A. D. 1886, shall be removed therefrom, upon the demand of the Principal Chief or otherwise, the value of his improvements, as the same shall be appraised by a board of appraisers to be appointed by the President of the United States, one of the same upon the recommendation of the Principal Chief of the Cherokee Nation, for that purpose, shall be paid to him by the Cherokee Nation; and upon such payment such improvements shall become the property of the Cherokee Nation: Provided, That the amount so paid for said improvements shall not exceed the sum of \$250,000: And Provided further, That the appraisers in determining the value of such improvements may consider the value of the use and occupation of the land.'

"In other words, Mr. President, by the Act of Congress confirming and sealing that contract, by which we purchased the Cherokee Outlet, we agreed that they should be considered as intruders whom that nation did not recognize as citizens, with the exception of those particular cases specially named.

"I think that argument leaves no sort of question of the proposition that the right to determine the citizenship of the several nations, certainly of the Cherokees, is as solemnly vested by contract and by statute in the nation itself as it is possible for the Congress of the United States to accomplish it.

“The question then is presented whether by an amendment thrust in upon this appropriation bill we shall trample down, hardly more than three years after, that agreement upon which we obtained their lands, that right which we then declared to be theirs and covenanted to respect.”

In the court below, before any opinions were delivered in citizenship cases opportunity was afforded the representatives of all sides of the cases to be heard on the general principles which should govern the court in its decision. The Hon. Wm. M. Springer, Judge of the Northern District of the Indian Territory, after the conclusion of these arguments rendered a general decision which would govern him in disposing of every case. This was an able and exhaustive decision and from it we make the following extracts:

“In the opinion of this Court the following propositions are clearly established by the decision of the Supreme Court of the United States and the United States Court of Claims in the case of *The Eastern Band of Cherokees against The Cherokee Nation and the United States*, viz:

“First: That the lands and other property of the Cherokee Nation belong to it as a political body and not to its individual members. The lands are held as communal property not vested in the Cherokees as individuals, either as tenants in common or joint tenants. (See also opinion by Chief Justice Fuller of the Supreme Court in the case of *The United States against The Old Settlers*, 148 U. S., 427.)

“Second: That the North Carolina Cherokees, who are now known as the Eastern Band, who refused to join their countrymen in the removal to the lands ceded to the Cherokee Nation west of the Mississippi river, thereby dissolved their connection with what is now known as the Cherokee Nation. They became citizens of the states and subject to the laws of the states in which they resided, and have no right, title or interest in the lands or other property of the Cherokee Nation as now constituted.

“They have received either their due proportion of all the personal benefits accruing under the treaty of 1835-6, for their claims, improvements and per capita. Since their separation from the Cherokee Nation they have had no right to any portion of the lands or common property of the nation, or to any lands or

property held for the common use and benefit of the Cherokee people who constitute said nation.

“Third: That the phrase, ‘the whole Cherokee people’ used in the treaty of 1846, refers to those Cherokees only whose representatives participated in the making and ratification of the treaty, viz: The Cherokee Nation proper, the treaty party and the old settlers or Western Cherokees. Those Cherokees only were the recognized citizens of the United Cherokee Nation, and no other Cherokees were entitled to the rights and privileges of citizens of the Cherokee Nation, as now constituted.

“Fourth: If the Eastern band of Cherokees, or the Cherokees in all the states of the Union wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Supreme Court, and by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the lands, funds and common property of the nation. These lands, funds and property were dedicated by the Cherokee constitution, and were intended by the treaties with the United States for the use and benefit of the United Nation, and not in any respect for the use and benefit of those who have separated themselves from it and become aliens to the nation.

#### THE LAND TENURE.

“The Constitution of the Cherokee Nation, Article 1, Section 2, provides that the lands of the Cherokee Nation shall remain common property, but the improvements made thereon, and in possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may be rightfully in possession of them.

“The patent of the United States to the Cherokee Nation, issued on the 31st day of December, 1838, provides as follows:

“Therefore, in the execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, unto the said Cherokee Nation the two tracts of land so surveyed, and hereinbefore described, contained in the whole 14,374,135 and 14-100 of an acre, to have and to hold the same together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of Red Men to get salt on the salt plains of the Western prairie, referred to in the second article of the treaty of the 29th of December, 1835, etc.’

“ And subject, among other things, to the further condition, ‘ That the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same.’

“ It will be seen from the text of the patent by which the Cherokee Nation holds the lands belonging to it, that the title is in fee simple with certain conditions, called a base or qualified fee. The citizens who occupy the lands of the Cherokee Nation have no title to the soil, but merely a right to occupy such portions of the soil as they may cultivate, under the laws of the nation. The citizen occupant not having any title to the land, but owning the improvements only, cannot be said to be, either a tenant in common or a joint tenant, with any other citizen of the nation, because such tenure implies title of some kind in the tenant. Tenants in common have a unity of possession because no man can tell which part is his own. (*Brown's Blackstone's Commentaries*, page 263.)

“ Hence the possession of one citizen of a portion of the land of the nation is in no sense a tenancy in common. Nor are the citizens of the nations joint tenants, for joint tenants of land hold in fee simple or otherwise, and there must be a unity of interest, a unity of title, a unity of time, and a unity of possession. In other words the joint tenants have one and the same interest secured by one and the same conveyance, commencing at one and the same time and held as one individual possession. (*1 B., 256.*)

“ These definitions, therefore, do not apply to any condition existing in the Cherokee Nation as to land tenure and occupancy. A citizen of the Cherokee Nation has the exclusive right to the occupancy of the land upon which he has made improvements, or of which he is rightfully in possession. No other citizen of the nation has any right to occupy the particular tract occupied by another citizen; therefore, the citizens of the nation are neither joint tenants with other citizens of the nation or tenants in common. They occupy the lands in severalty. Each holding the possession in own right only, without any other person being joined or connected with him in point of interest during his occupancy. They are merely occupants in severalty.

#### THE UNITED NATION.

“ The Indians who by the treaty of 1835 agreed with the United States to emigrate west of the Mississippi river, were finally located in what is now known as the Cherokee Nation. The Western Cherokees, known as the old settlers, had preceded them to this country. A new nation was formed to consist of the Eastern and Western Cherokees. This act of union between the

Eastern and Western Cherokees was agreed to on the 12th day of July, 1838. In September following, as heretofore set forth in the opinion of the Supreme Court, a constitutional government was adopted in which it was recited that the Eastern and Western Cherokees had become united in one body politic under the style and title of the Cherokee Nation. Notwithstanding the formation of this union and the establishment of a new constitution and a new nation, all was not peace and harmony. Dissension arose which led to the formation of the treaty of 1846. This treaty was made and concluded between the following parties:

- “First.—The United States.
- “Second.—The Cherokee Nation.
- “Third.—The Treaty party, which was a faction of the Cherokee tribe of Indians at that time.
- “Fourth.—By the Old Settlers or Western Cherokees.

“This treaty recites the fact that serious difficulties for a considerable time past had existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it was desirable should be speedily settled so that peace and harmony might be restored among them. With a view to final and amicable settlement of these difficulties that treaty was agreed to.

“The first article provides, among other things, that ‘the lands now occupied by the Cherokee Nation shall be secured to the whole people for their common use and benefit.’

“The words, ‘the whole Cherokee people’ mentioned in this article evidently refer to the parties who participated in the formation of the treaty, and, as Chief Justice Richardson held in his opinion, to which reference is made, these words did not embrace what is known as the Eastern band of Cherokees. Nor do they embrace the Cherokees who have separated themselves from the tribe and taken up their residence in the states.

#### THREE CLASSES OF CHEROKEES.

“From these treaties and from provisions in the Cherokee constitutions it will be seen that there were, and have been since the establishment of the present Cherokee Nation west of the Mississippi River, three classes of Cherokee Indians.

“First: Those who were citizens of the United Cherokee Nation, the nation as now constituted, and which occupies the lands ceded to the nation west of the Mississippi River.

“Second: The Eastern Band of Cherokees which constitutes all those individuals and families of the old Cherokee Nation, who were averse to the removal of the Cherokee country west of the

Mississippi River, and who were desirous to become citizens of the states in which they lived, and where they then resided

“Third: Those Cherokees, mentioned in the Constitution of the United Cherokee Nation, and also in the Constitution of the old Cherokee Nation, who were described as follows: ‘Citizens who shall remove with their effects out of the limits of this nation and become citizens of another government.’ Such Indians were declared by the Cherokee Constitution to have forfeited all their rights and privileges as a citizen of the nation. It was provided, however, with reference to this latter or third class, ‘that the National Council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on their memorializing the National Council for such readmission.’

“Those who are now claiming the right to be enrolled as citizens of the Cherokee Nation come within one or the other of the last two classes mentioned.

#### WHO MAY BE ADMITTED TO CITIZENSHIP.

“This court has no jurisdiction or power under the Acts of Congress by means of which the pending cases are being considered to exercise and discretion as to who should or who should not be enrolled as citizens of the Cherokee Nation. It has the power simply to determine who are legally citizens thereof, and who ought to be so regarded, but who are now denied the rights and privileges of citizenship by said nation. The law of Congress conferring jurisdiction on this court to consider these cases, provides that the United States Commission ‘shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes.’

“While no rule of decision is laid down in the Act of Congress for this court, it will be assumed that the same provisions of law apply to this court that were made applicable to the United States Commission. The direction is to ‘respect’ all laws of the several nations. What is meant by the word ‘respect’ as used in this connection? There can be but one meaning, and that is that the court and the United States Commission should give effect to all such laws. The next phrase in the Statute is as follows: ‘And all treaties with either of said nation or tribes.’ The word ‘respect,’ therefore, applies equally to the treaties as to the laws. The next phrase is as follows: ‘And shall give due force and effect to the rolls, usages and customs of each of said nations or tribes.’



“ This court must, therefore, respect or give effect to all laws of the several nations, not inconsistent with the laws of the United States, and must give effect to all treaties with either of said nations, and must give due force and effect to the rolls, usages and customs of each of said nations or tribes. In this last provision Congress has recognized the fact that the Cherokee Nation has a right to determine who shall be and who shall not be citizens of the nation. The National Council may, in its discretion, confer citizenship upon any person, or it may establish courts of commissions to hear and determine applications for citizenship in the nation. In determining, therefore, who among those now claiming citizenship should be enrolled as citizens of the Cherokee Nation, this court will look to the laws of the nation and consider whether these laws are in conflict with the laws of the United States. It will also ascertain who have been lawfully adjudged to be citizens by tribunals or commissions duly authorized to pass upon their applications. And it will consider the treaties that have been made between the United States and the nation, and it will give due force and effect to the rolls, usages and customs of the nation in dealing with citizenship cases.

“ In order to determine what is the law of the Cherokee Nation, the same rules of construction must be applied as would be applied to the laws of Congress or of any state in this Union. If the law should be found to be in conflict with the Constitution of the Cherokee Nation it would be null and void, just as the law of Congress in conflict with the Constitution of the United States would be null and void.

“ In considering the treaties which have been made between the Nation and the United States, they must be carried into effect and the true intent and meaning of them must govern. If it should appear that any of the treaties had been abrogated by Congress such treaties would no longer be in force.

“ In order to give due force and effect to the rolls, usages and customs of the nation this court will inquire into such rolls, usages and customs. Congress has already defined what is meant in the Act of June 10, 1896, by the words, ‘ rolls of citizenship.’ The rolls of citizenship as defined by Congress have been confirmed. The Amendment Act which is found in the Indian Appropriation bill passed June 7, 1897, is as follows:

“ ‘ Provided, That the words, ‘ roll of citizenship,’ as used in the Act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the

nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the Act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this Act. And any name appearing on such rolls and not confirmed by the Act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: Provided, also, That anyone whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the Act of June tenth, eighteen and ninety-six.'

" This provision of course will take effect from the date of its passage, and this court will give such construction to the words, "rolls of citizenship," used in the Act of June 10, 1896, as is provided for in this amendment.

" It is competent for Congress by subsequent Acts to declare the meaning which should be given to Acts previously passed, and this court will carry into effect the meaning which Congress subsequently provided should be given. \* \* \*

#### ADJUDICATION IN CITIZENSHIP CASES.

" In all cases wherein it appears that applicants for citizenship in the Cherokee Nation filed their claims before the proper tribunal or commission, and in all cases where the tribunal or commission acted within the scope of its jurisdiction, as prescribed by the law of the Cherokee Nation, and admitted such persons to citizenship, this court will regard such cases as adjudicated; and in all cases where such applicants were rejected, the same rule will be applied. In order to set aside such adjudications, whether in favor of or against such applicants, it must be made to appear to this court, either that the tribunal or commission acted without jurisdiction, or that the decision of the commission was procured by fraud. 'A judgment by which the court exercised a power not conferred upon it by the Statute under which it assumed to act is a nullity and will be so treated when it comes in question, either directly or by appeal or collaterally.'

*Allison vs. T. A. Snider Preserve Co., (Sup. Ct. App. Term.,) 20 Misc. 367.*  
*45 N. Y. Sup., 925.*  
*Risley vs. Bank, 83 N. Y., 318.*

“In order that the adjudication of the tribunal or commission should be set aside for fraud, it must clearly and affirmatively appear that the case was fictitious; that the judgment of the tribunal was procured by the beneficiaries thereof by bribery or other corrupt means, and that the judgment should not in equity and good conscience be regarded as a valid judgment.

“Justice requires that every case, having been once fairly and impartially tried, should be forever closed, and public tranquility demands that all litigations of that kind between those parties should cease. A judgment entitled to this consideration must, however, be the judgment of the tribunal.

“‘The rule is well settled that a judgment or decree of any court will be set aside in a court of equity if it be made to appear that it was procured by fraud. This rule needs no citation of authorities to support it, because it is too well established and known to need such citation. But the proof of the fraud and the facts evidencing it must be clear and satisfactory to the court before it will act. It will not proceed upon doubtful inferences.’

*Davis against Jackson, 39 S. W. Rep., p. 1076.*  
(*Supt. Ct. of Tenn., March 13, 1897.*)

“It is not enough to allege and prove that the tribunal erred in his decision; or that perjured testimony was introduced and considered, unless such perjured testimony was given by the beneficiaries of the judgment, or by their procurement.” (*Black on Judgments, Vol. 1, Sec. 323.*) It will be taken for granted that the court or tribunal fairly weighed and considered such testimony and disregarded it. The judgment itself must be corrupt, or procured by corrupt means, or the court must have acted without jurisdiction, in order to render it a nullity.

“In all cases where claimants have appeared before tribunals or commissions, established by the Cherokee Nation, and have had their cases considered fairly and honestly, this Court will not disturb the judgment. The burden of proof will be upon those who allege a fraudulent judgment to prove it. The law presumes, not only that the acts of courts, but the transactions of individuals are honest. Those who allege fraud are required to establish it conclusively. (*Black on Judgments, Vol. 1, Sec. 321*, and authorities there cited, namely, *Jones vs. Britton, 1 Woods, 667; Caldwell vs. Fifield, 24 N. J. Law, 150.*)

“In all cases where a tribunal or commission, having jurisdiction of the case, has passed upon it, the decision will be binding upon this Court, unless it clearly appears from the evidence in the case that the judgment is so fraudulent that a court of competent jurisdiction should set it aside and declare it a nullity.

INDIANS RESIDING IN THE STATES.

“Frequent reference has been made in the briefs and arguments of counsel in citizenship cases to the case of *John Elk vs. Charles Wilkins*, decided by the Supreme Court of the United States, and reported 112 *U. S. Reports*, pages 94 to 123. The plaintiff in this case brought suit against the defendant, who was one of the registrars of election in the city of Omaha, Nebraska, for refusing to register him as a voter, and for refusing to permit him to vote at an election in that city, in April, 1880. The defendant refused to register and to permit plaintiff to vote on the ground that he was an Indian, and not a citizen of the United States. In that case the Supreme Court of the United States held as follows:

“ ‘An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognized as a citizen, either by the United States or the state, is not a citizen of the United States, within the meaning of the first section of the Fourteenth Article of the Amendment of the Constitution.’

“ It will be seen from this quotation from the syllabus in that case that an Indian who had separated himself from his tribe, but who had not been naturalized or taxed or recognized as a citizen, either by the United States or the state, is not a citizen of the United States. The Court further on in its opinion in this case held as follows:

“ ‘The alien and dependant condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorized individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for example of which see treaties in 1817 and 1835 with the Cherokees and in 1820, 1825 and 1830 with the Choctaws.’

“Reference is had, it will be seen, from these quotations from the decisions of the Supreme Court, to the treaties with the Cherokees in 1817 and in 1835. The treaty with the Cherokees in 1817, Article 8, provides as follows:

“ ‘And to each and every head of any Indian family residing on the east side of the Mississippi river on the lands that are now

or may hereafter be, surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of 640 acres of land, in a square, to include their improvements, which are to be as near the center thereof as practicable, in which they will have a life estate, with reversion in fee simple, to their children, reserving to the widow her dower, the registry of whose names is to be filed in the office of the Cherokee Agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty: Provided, That if any of the heads of families; for whom reservation may be made should remove therefrom, then, in that case, the right to revert to the United States.'

"The treaty of 1835, referred to in the decision of the Supreme Court, Article 12, contains this provision:

" 'Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the states where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due proportion of all the personal benefits under this treaty for their claims, improvements and per capita as soon as an appropriation is made for this treaty.'

"There was an additional provision allowing the Indians referred to in that article to have a preemption right to 160 acres of land to be given to those who were desirous to reside within the states of North Carolina, Tennessee and Alabama. A supplemental treaty to this, proclaimed May 23, 1836, relinquished and declared void the preemption rights and reservations provided for in the treaty of 1835.

"These two articles, however, in the treaties of 1817 and 1835, clearly indicate the intention of Congress that such Cherokee Indians as were averse to removal to the country west of the Mississippi, might become citizens of the states where they resided.

"In the case of the *United States vs. Boyd et al*, decided by the Circuit Court of the United States for the Western District of North Carolina, in June, 1895, (68 *Federal Reporter*, pages 577, 585) it was held that 'the Indians belonging to the Eastern Band of Cherokees in the State of North Carolina have never become citizens of the United States, and the Federal Courts have jurisdiction to entertain a suit brought by the United States, as guardian of such Indians for the protection of their interests.'

"In the opinion of the Circuit Court of the United States in this case the Court used this language: 'By the treaty of New Echota (treaty of 1835) individuals and families who were averse to removal with the nation were suffered to remain in the states

in which they were living, if they were qualified to take care of themselves and property, and were desirous of becoming citizens of the United States. Those who exercised these privileges terminated their connection with the Cherokee Nation.' (*Eastern Band of Cherokee Indians vs. United States*, 117 U. S., 288; 6 Sup. Ct., 718.) Did this make them citizens of the United States? The Circuit Court here quotes with approval the decision of the Supreme Court in the case of *Elks vs. Wilkins*, *supra*, and then continues as follows: 'There is nothing in the record going to show that these Indians (Eastern Band of Cherokees) were ever naturalized.' Have they been made citizens by treaty? Article 12 of the treaty of 1835 is then quoted by the Circuit Court, and its opinion continues as follows: 'This does not confer on them citizenship. It only authorized them to become citizens when it is recognized that they are qualified or calculated to become useful citizens.'

'The Court then pointed out that they could only become citizens of the United States by naturalization. The Court continued as follows: 'But it must be understood that these Cherokee Indians, although not citizens of the United States, and still under pupilage, are independent of the State of North Carolina. They live within her territory. They hold lands under her sovereignty, under her tenure. They are daily in contact with her people. They are not a nation or tribe. They can enjoy privileges she may grant. They are subject to her criminal laws. None of the laws applicable to Indian Reservations apply to them. All that is decided is that the Government of the United States has not yet ceased its guardian care over them nor released them from pupilage.'

'It is clearly held in this opinion of the Circuit Court of North Carolina that the Eastern Band of Cherokees is not a part of the Cherokee Nation as now constituted. And if the Eastern Band of Cherokees, which has preserved a distinct tribal organization under the tutelage of the United States, is not a part of the Cherokee Nation as now constituted, it follows even with greater force that those Indians who removed with their effects out of the old Cherokee Nation before the removal of its citizens west of the Mississippi River, as well as those who have moved from the limits of the nation as now constituted and become citizens of any other government, have forfeited all their rights and privileges as citizens of the Cherokee Nation.

'A careful examination of the treaties which have been made with the Cherokee Nation by the United States will clearly establish the fact that nowhere does it appear that the Cherokee Indians, who have separated themselves from the tribe or taken up their residence in the states, are taken into consideration,



except the provisions in reference to the Eastern Band of Cherokees, and those in reference to Cherokees who accepted reservations of land under Article 8 of the Treaty of 1817, and those who received their due proportion of all personal benefits accruing under the Treaty of 1835, Article 12. The treaties in reference to those classes of Cherokee Indians recognized the fact that they had separated themselves from and ceased to constitute a part of the Cherokee Nation. And, as is held by the Supreme Court of the United States in the case of the Eastern Band of Cherokees against the Cherokee Nation, *supra*, these Indians 'ceased to be a part of the Cherokee Nation and henceforth they became citizens of and were subject to the laws of the states in which they resided.' And further, if the Cherokee Indians, who have separated themselves from the Cherokee Nation have taken up their residence in any of the states of the union, wish to enjoy the benefits of citizenship in the Cherokee Nation, they must comply with the Constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided. 'They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. By the terms of the various treaties between the United States and the Cherokee Nation, during the time the nation was divided into the Eastern and Western Tribes, the annuities were divided between the two branches of the nation, according to their respective members to be ascertained by a census to be taken. The annuities thus divided were regularly paid as stipulated until commuted by the Treaty of 1835. This clearly shows that the United States regarded those Cherokees only who were citizens of the nation as entitled to annuities, and as having any right or interest in Cherokee lands or property.'

"In determining who are citizens of the Cherokee Nation, the following propositions will govern this Court:

"First: That those Indians who have separated themselves from the present Cherokee Nation, or from the old Cherokee Nation east of the Mississippi River, and have taken up their residence in the states, and have moved their effects out of the limits of the nation and the Eastern Band of Cherokee Indians who remained in the states after the Treaty of 1835, have forfeited all their rights and privileges as citizens of the nation, and that such persons cannot regain their citizenship unless they comply with the Constitution and laws of the Cherokee Nation and be readmitted to citizenship as therein provided.

"Second: That this court recognizes the legislation of the Cherokee Nation constituting the Supreme Court, and thereafter the Chief Justice of the Supreme Court, tribunals to pass upon certain classes of citizenship cases, and also the legislation of the



Cherokee Nation creating commissions with prescribed powers to pass upon applications for citizenship in the Cherokee Nation, as passed in accordance with the general legislative power of the nation, and will respect such legislation to the extent that it may be in accordance with the Constitution and laws of the United States and the treaties made between the United States and the Cherokee Nation. In construing such legislation the Court will apply to it the same general principles of statutory construction which should be applied to the Statutes of any of the states of the union, or to the Statutes of the United States.

“Third: That blood alone is not the test of citizenship in the Cherokee Nation. That those Cherokees, and their descendants, who have separated themselves from the nation, and have removed their effects from it and taken up their residence in any of the states of the Union have ceased to be citizens of the Cherokee Nation.

“And further, that *bona fide* residence in the nation is essential to citizenship.

“Fourth: Full faith and credit will be given to the judgments of the tribunals and commissions in citizenship cases, unless it is made to appear that the tribunal or commission acted without jurisdiction, or that its judgment was procured by fraud, as more fully explained in this opinion. The acts of the Cherokee Council in determination of applications for citizenship in the nation will be regarded as judgments of a court and will be subject to the same tests as to their validity.”

We will now proceed to see whether or not the principles we have endeavored to present on our side dispose of the case immediately in hand. The record on both sides discloses the fact (*Record, page 19*) that not only did the applicants apply to the National Council for admission and were denied, but that they went before a commission on citizenship, (*Record, page 16*), which, after a full hearing, rendered judgment against them. It has been too frequently held to need the citing of any law to sustain it, that the judgments of the tribunals of the Five Civilized Tribes are as valid and binding everywhere as those of the courts of any of the territories of the United States. If there were no other reasons for denying these applicants, the judgment of the Cherokee Commission denying them would be conclusive.

But suppose that judgment has no effect and we put them in the position before the Dawes Commission of an Indian by blood who had never gone before any tribunal of the Cherokee Nation, or elsewhere, and they would still have no right to be declared citizens of the Cherokee Nation. They were not members of the Nation when the treaty of 1835 was made, having previously, according to their own proof, severed their connection with it. They did not consider themselves as citizens of the Nation, and the Dawes Commission had no right to declare them so unless they were in fact so. Let us see now if the history of the principal applicant and his people does not amply sustain this statement.

William Stevens, it seems, was born in Clark county, Ohio, in 1827, moving in 1849 to Illinois, where his mother joined him in 1852. The two went to the Cherokee Nation in 1870. Stevens seems to have had no knowledge whatever of his father. He did not really seem to have known his name until he was informed of it by his alleged uncle, William Allenton, who devised pretty much all of the history connected with this case. Where this father came from, where he went to, or what his end was, this romance fails to disclose. His mother's name was Sarah. After application was made in this case to the Cherokee authorities it was somewhere learned that her maiden name was Sarah Ellington, or Allenton. She, it seems, had never had occasion to write it, but her brother, who seems to have kept the family name, as well as all of its secrets and history, had always spelled it Allenton. Her father, she claims was a celebrated Indian by the name of Captain Shoe-boots. His Indian name was Te-as-ki-yarga. This Indian was a very picturesque character and was very fond of the trappings and fixings of military life. It is said that he fought in the war of 1812. At any event the fact that he after-

wards attired himself in military dress, wore a sword danggling at his side in time of peace, made him a well known character at that time.

This character further distinguished himself after that time by marrying a negro slave by whom he had three children. The connection of these applicants with Captain Shoe-boots is claimed to have been long anterior to his achievement of these distinctions, because they say that the grandmother of William Stevens, whose name it seems they found out late in life to be Clarinda, was, in 1780, a young girl in the State of Kentucky, at which time she was taken a prisoner by a band of mar<sup>u</sup>uding Cherokees and taken to the reservation of the Cherokee Indians in Georgia, where, at the age of 16 she was taken as wife by Captain Shoe-boots. There were born to them it seems, in the Cherokee Nation, three children, John, Sarah (mother of applicant) and William, respectively in the years 1794, 1796 and 1801. In 1802, a year after William was born, this woman was induced by her relations in Kentucky to return to them on a friendly visit, which lasted until she died in 1840, never returning to her husband, and he never seeking to know the fate of his three children. It is claimed that the girl, Sarah, married in 1820, and removed in 1825 to the State of Ohio, where in 1827 her son William, the applicant was born. The record, however, discloses that in the same year she was in Kentucky, where she heard of her father's death in the Cherokee Nation, which was then in the State of Georgia, and that she returned there and got here father's patrimony, though no witness who ought to have known anything about this ever heard her make any statement about it. Although she lived in the Indian Territory for a number of years and died in October, 1875, she left no written evidence or testimony of the truth of the claims asserted by her descendants. Many of the

witnesses whose testimony is in the case had testified at different times and before different officers and courts. We will give an abstract of some of the more important of this class with a few comments on their inconsistencies and improbabilities:

*Jno. L. McCoy*, before Agent Tufts, 1880, (*Record*, p. 10):

“He saw the mother of applicant in 1827 in the Cherokee Nation, when she came from Kentucky to get her patrimony. She was acknowledged as Shoe-boots’ daughter. Saw her again at Tahlequah in 1874 or ’75. Her son was with her.”

She had already moved to Ohio in 1835, having married in 1820. In 1827 she was 33 years old and in 1874 or ’75 would have been 80 or 81. Again, 1827 was the year applicant was born in Ohio.

*Same witness* (*Record*, p. 11) in 1888:

“He understood Mrs. Stevens’ name was Annie (*Record*, p. 12). She said William was her son. Her mother was a white woman, so he was informed.”

Mrs. Stephens was recognized by no one as a Cherokee except him. Stevens informed him that they moved from Illinois to Kansas.

*Same witness*, September 28. (*Record*, p. 11):

“He knew Mrs. Stevens and that she was a halfblood Cherokee. Knew her in old Cherokee Nation where he met her mother 60 years ago. Knew Mrs. Stevens’ father, a fullblood, called Captain Shoe-boots.”

It will be seen also in the record that he married a negro and has plenty of his colored descendants in the present Cherokee Nation as appears by record in case of *William Shoe-boots, rejected claimant*.

*Same witness* again testifies (*Record*, page 32):

“Came from home to Tahlequah and met Stevens. Stevens asked him if his name was Alex; told him that was his father’s

name. Said he heard his mother speak of Alex McCoy, and stated his mother was a daughter of Shoe-boots. Told Stevens he knew Shoe-boots back in the old nation. Remembers a lady's stopping at his father's who claimed to be a Cherokee, and said she was from Kentucky; had learned of her father's death—her father was Shoe-boots. His father advised her how to get her father's property. Understood she was successful in her business and returned to Kentucky. Stevens asked if I would know his mother, and I told him I thought I would. She resembled her father."

Describes the father:

"Shoe-boots was a very peculiar looking man, from the fact that he was a very tall man—his garb was that of a military officer's style. He wore boots, the legs of which reached above his knees. His hat was that of a British military hat, with a red plume in front, that is straight up. His coat was a British military uniform coat, which was kipped with red scarlet cloth. Next is, he wore a strap across his shoulders, and on that strap 'swung a long sword.'

"He knew Mrs. Stevens for she was 'the very model of her father.' Saw her in 1826 or 1827 at his father's house. She was then unmarried. He was 16 years old then." *Comment.*—Mrs. Stevens was married and living in Ohio in 1826 and 1827. Wm. Stevens was born in 1827. Compare his three statements.

*Wm. Ellington Shoe-boots before commission in 1883, (Record, page 12):*

"84 years old—resides in Booco county, Texas. Father was Shoe-boots, Cherokee name, Te-as-ki-yarga. Born in Hightower, Ga. Went to Kentucky. Father sent a negro and some ponies 'with me and my mother to Kentucky to see some of my mother's people.'

"Lived near Mt. Sterling, Ky., with his uncle, Jacob Ellington. Claimant's mother went to Ohio. Says Wm. Stevens' father was a white man, named Robert Stevens. Wm. Stevens' mother was his sister. Never went back to Georgia, from Kentucky. Had one brother and one sister. Drew old settlers' payment in 1852. Recollects seeing his father, but he was so little he doesn't recollect much about him. Must have been two or three years old when he went from Georgia to Kentucky. Never saw his father afterwards. Mother told him he was a Cherokee. Never saw claimant until six or seven years ago. Might have seen him or his brother, Jake."

Where is Jake?

Left Georgia in 1802. So if he was born 1801 as alleged in petition, he was a year old and could not have known much of his father, and as little of the trip with the negro and the ponies. Besides, if he was 84 years old in 1883 as sworn to, he was born in 1799. From whom did he get his family history? No man or woman by name of Wm. Shoe-boots drew in 1852. See proof below.

He again (*Record*, page 30) says:

“Son of Te-as-ki-oka—Shoe-boots. Mother’s name, Clarinda Ellington. In 1801 and 1802 when he was six or seven years old, mother took him, brother John and sister Sarah to Mt. Sterling, Ky., to see her people; his father sent a negro man along by the name of Mingo. Sister Sarah married a man by the name of Robert Stevens and moved to Ohio. 1851 he came back to the nation and stayed with Jess Mayfield, living 25 miles from Tahlequah. Remained here four or five months, establishing his rights to citizenship. Proved his right to satisfaction of Cherokee Council and was admitted, and drew ‘old settlers’ money of \$1,544.25 and returned to Texas. Knows Wm. Stevens to be the son of his sister Sarah.”

Never was admitted by council; none of his relations were old settlers. Never saw Wm. Stevens as a boy and could not possibly have known he was his sister’s child. Signs his name Shu-boots. Though born in 1802, he says he was six or seven years old in 1801 or 1802.

*John Harnage*, 1887, before Senate Committee. (*Record*, p. 15):

“Seventy years old. Resident of Kilgore, Texas. In the year 1851 William Ellington drew annuity from Cherokee Government. Has no knowledge of William Stevens being a relative of Shoe-boots. Never heard Ellington speak of him, heard him speak of one or two sisters. Has a faint recollection of seeing William Shoe-boots. Knew of Ellington’s history by investigation before committee by nation to determine who were entitled to draw. Evidence showed Ellington’s mother a white woman.

but did not show he had any brother. Ellington took his mother's maiden name."

By whom in this country could Ellington have proven his right to old settlers' money, having left the old nation when a year old. He came here after 1835. His testimony is a tissue of lies from beginning to end.

*William Harnage*, before Allen Ross, Sept. 13, 1881, (*Record*, p. 30 ) :

"Met William Stevens in February, 1871. When Stevens told him he belonged to Shoe-boots' family, he replied that he had met a half-brother of Shoe-boots' children in Texas, July, 1850. He told Harnage he had two half-brothers and a sister that were Cherokees, but he did not know who the father of the children was, but his mother always told him he was an Indian by the name of Shoe-boots. Said his father's name was Anderson, but the other children's father was called Shoe-boots, but children took their mother's name, Allington. Anderson, one of his half-brothers was out west. Harnage then put him on to the old settler scheme, and saw him afterwards in the nation and understood he established his right and drew his money. Saw him again in nation in 1880 and recollected him as the same man who drew head-right in 1850. Had always understood that Shoe-boots had three children by a white woman in the states."

*Mrs. M. A. Bigbey*, July 22, 1880, (*Record*, p. 31 ) :

"Remembers a man by the name of Allington or Shoe-boots stopped at her house and drew 'old settler' money. Has been re-visited by a man she believes to be same man. His name and date of his birth was recorded in a book by Mr. Mayfield, her first husband, and produces book, and discloses the fact that William Allenton or Shoe-boots was born on 17th of October, 1804."

Ellington states he left Georgia for Kentucky in 1801 or 1802; that he was 6 or 7 years old at that time.

*Capt. Nathaniel Fish*, before commission November 11, 1882, (*Record*, p. —) :

"Eighty-three years old. Was acquainted with old man Tah-se-ke-yah-ke ( Shoe-boots ); he had a wife and she was black. Said his other wife and children had gone back to their country:



his sister said there were two boys and one girl. Carried weapons, at times a smoking tomahawk, sometimes a sword. What he testifies to he heard Shoe-boots' sister say."

*Same witness, before commission in case of William Shoe-boots, August 22, 1887, (Record, p. 25):*

"Was well acquainted with Capt. Shoe-boots, a relative. Told same story as above, about meeting Shoe-boots and his negro wife. Lived a day's journey in old nation from where Shoe-boots lived. Shoe-boots must have been 60 years old when he first saw him, about four years after Creek war. Never knew of him having any children. Gives Shoe-boots the same Cherokee name he gave in William Stephens' case, and evidently testifies about the same man, Tah-se-ke-yah-ke. Contradicts his statement above, by testifying that Shoe-boots never told him at that time that he ever had any children."

His first testimony is the only shadow of evidence that Shoe-boots ever had a white wife save the uncorroberated and hearsay testimony of William Ellington, which the record in case of William Shoe-boots, a copy of which is attached to this case, shows positively to be untrue, and that his wife was Dolly, a negro woman, who had several children, one of which, John, was sold south from the nation. Fish again testifies he did not know Shoe-boots had any children. See particularly the testimony of Mrs. Darkey Saff<sup>f</sup>gee. She says that Capt. Shoe-boots, who had the negro wife, had for his Cherokee name Tah-se-kah-yah-kee, and that his negro wife had three children, two boys and one girl, corresponding exactly with the manufactured history in this case.

The proof in the other case shows that Capt. Shoe-boots did have a negro daughter by old Dolly named Elizabeth. William Shoe-boots and others swear that his father, Tah-se-ka-yah-ki, was Capt. Shoe-boots, and that his wife was the negro Dolly.

William Shoe-boots, colored, drew "old settler" money, and it was he doubtless and not William Ellington that drew this

money. His mother came here as old settler, whereas neither William Ellington or his alleged relations did.

In conclusion we would say that this claimant sets much store by the report of the commission on citizenship and the letter of the chief to council. It is perfectly evident that both were made on evidence not in the case, but adduced in case of William Shoe-boots, and that the two cases, which are wholly different, were confused.

The William Shoe-boots claimants proved Indian blood and confessed their mother Dolly, wife of Captain Shoe-boots, was a negro, but tried to prove that they were freeborn. The report itself is ample proof of this (*Record, p. 16*), in that it says:

“William Stevens alleges as his Cherokee ancestor, from whom he has endeavored to prove his rights to citizenship, one William Shoe-boots, and William Shoe-boots alleges as his Cherokee ancestor, from whom he has endeavored to establish his citizenship one John Shoe-boots. These names, William and John Shoe-boots, fail to appear on any rolls of Cherokee mentioned in the seventh section of Act of December 8, 1886, or those mentioned in Act of February 7, 1888.

“William Shoe-boots is a son of old Te-as-ki-yarga, a Cherokee Indian, who died prior to the treaty of 1835, and the brother of Lizzie and Polly Boots, whose names appear on the emigrant roll of Cherokees in Delaware District, for the year 1852 as Cherokees.”

What evidence connects Polly and Lizzie Boots with William Shoe-boots? The rolls do not, the only evidence of their existence. (*Record, p. 35.*)

Now William Stevens has not alleged or attempted to prove any such thing; but all that proof appears in the negro case of William Shoe-boots. There is not in this case a scintilla of reliable or reasonable proof that William Stevens is a descendant of Captain Shoe-boots, or Te-as-ki-yarga, or that the latter ever had a white wife. There is indeed positive and unequivocal proof of

the contrary. Is it not strange that in these years of striving for citizenship, in a contest which began 25 years ago, that William Stevens' mother, who only died in 1875, never made a statement orally, or in writing, to anybody; and that Stevens himself never made an affidavit before this application, and that he now states as the sole authority for his facts, his deceased mother? According to their record his grandmother lived with Captain Shoe-boots fourteen years before they had children, and then immediately after the birth of three children, left him to return no more. The daughter only returning to get her dead father's property, which the proof shows consisted only of a negro woman, his wife, and three negro children.

There are a number of cases before this Court which have some features which distinguish them from the majority. One or more of the cases involve the question of the right of the nation to revise by subsequent proceedings the judgments of its several citizenship commissions, admitting claimants to citizenship. Several of these persons gained their citizenship as contended by the nation, through fraud and bribery, and subsequent commissions were created to inquire into those decisions and determine the question of fraud. We have contended previously in this brief that it was beyond the power of the council under the Cherokee constitution to pass acts delegating to commissions or courts the right to admit citizens, this being under the Cherokee constitution exclusively a legislative function. If, then, the council went beyond its constitutional authority no jurisdiction was conferred on these commissions, and advantage might be taken of this want of jurisdiction at any time and in any proceeding.

*1 Black on Judgments, Sections 278, 279.*

*Grimmet vs. Askew, 48 Ark., 156.*

*Hall vs. Lanning*, 91 U. S., 160.

*Pennoyer vs. Neff*, 95 U. S., 714.

But granting *gratia argumenti* that these several acts are not unconstitutional, we fail to see how appellees can be bettered thereby, for the same plea of *res judicata*, if sauce for them, is equally sauce for us, and we had the last inning.

When these judgments were subsequently opened up the judgments by which the applicants were admitted to citizenship were not pleaded and, therefore, they are bound by the judgments of the commissions which last investigated their cases.

“The last judgment rendered in regard to a matter is *res judicata*. The former judgment must be used to prevent it. It calls upon the adverse party to show all his reasons why it should not be rendered; and one of his reasons is that another court has determined the matter. But if he does not bring that fact to the attention of the court, or if he does do so and it is disregarded, in either case the former judgment the same as all other defenses, is concluded.”

*1 Van Fleet, Former Adjudication, p. 91, and authority cited.*

See also

*1 Van Fleet, Former Adjudication, p. 505.*

Again this Court has decided that when any person was adopted by an Indian Nation that the same power which adopted him and conferred citizenship on him, could take it away.

*Roff vs. Birney*, 168 U. S., 218.

It has been contended all along that these judgments, if judgments they were, could not be opened up for fraud.

The principle that every judgment and decree may be opened,

vacated and set aside for fraud, is too well settled to need any other authority than the statement of the proposition.

“It is a well settled principle of equity that fraud vitiates all transactions, even the most solemn, and judgments are not beyond attack on this ground.”

*Herman on Estoppel, Section 591.*

“Fraud vitiates everything and a judgment equally with a contract.”

*Wells on Res Judicata, Section, 499.*

If it be said that the Court rendering the original judgment had ceased to exist, or that this was legislative interference, we reply that the Court derived all its powers in the first instance from the council, and the admission of any warrant of law for such a grant of powers carries with it necessarily the right to pass the laws under which the commissions acted, for in each instance the only thing which breathed the breath of life into their proceedings was the delegated authority of the council. If the council was acting through the first commission, it is the council still which acted through the others.

The rule is, however, perfectly well settled that “to establish fraud it is not necessary to prove it by direct and positive evidence.” “If the evidence is sufficient to satisfy the mind and conscience of the existence of fraud, it will suffice.” The leading American case is that of *Kaine vs. Weigley*, 22 Pa. St., 179, which is inaccessible to counsel for appellee, but the doctrine is reaffirmed in *Burt vs. Timmons*, (W. Va.,) 6 Am. St. Rep., 664, and the meat of Chief Justice Black’s opinion in *Kaine vs. Weigley*, is quoted.

*Graver vs. Faurot*, 22 C. U. A., 156.

The Cherokee Nation was a sovereign so far as its acts affecting those it had jurisdiction over was concerned. It had a right to prescribe any method it saw fit to open up the judgments of its courts or commissions. In fact they were not courts, the judges of the courts sat merely as a commission.

*U. S. vs. Farrier, 13 How., 52.*

*U. S. vs. Ritchie, 17 How., 525.*

It has been decided that the United States might, notwithstanding the general rule as to conclusiveness of judgments, and particularly of judgments of naturalization, maintain a bill to cancel and set aside a judgment of naturalization where the same had been fraudulently procured just as it might maintain a bill to cancel letters patent procured by fraud.

*United States vs. Norsch, 42 Fed., 417.*

We do not apprehend the correctness of such a proposition will be seriously controverted, and we think it equally clear that within the limits of its functions the Cherokee Nation is possessed of the same powers as any other sovereignty. That as the United States has complete control over its citizenship, so the nation has complete authority over Cherokee citizenship and where a judgment of citizenship has been obtained by fraud practiced upon her courts or other tribunals the Cherokee Nation may proceed in due form of law to vacate and set aside those judgments, and especially such as conferred the political right of citizenship.

The Cherokee Nation not being bound by the rules of common law but only by its own constitution and the Constitution of the United States may lawfully adopt whatever proceedings shall to its legislative power seem most proper; and constitute whatever tribunal it pleases for opening, vacating and annulling

these fraudulent judgments, the sole requirement being that what is done shall be by due process of law.

Referring again to our position, that a proper construction of the language of the law granting appeals to this Court limits the Court to the consideration solely of the constitutionality of the law, and that any other construction would make much of the sentence surplusage; it is a well settled rule in such cases that the language must be given that construction which will render the whole of it, if possible, intelligible and avoid surplusage.

*Montesquey vs. Heil, 23 Amer. Decs., 471.*

*Gates vs. Salmon, 95 Amer. Decs., 139.*

It has been suggested that the comma after "citizenship cases," warrants a different construction, but this Court has said that in arriving at the real meaning of the lawmakers, we must, if need be, disregard the punctuation.

*Hammock vs. Farmers Loan and Trust Co., 105 U. S., 77.*

Respectfully submitted,

WILLIAM T. HUTCHINGS.

Attorney for Appellee.





N<sup>o</sup>. 423 re.

Motion as to counsel

Office Supreme Court U. S.  
FILED

FEB 24 1899

MURPHY McKENNEY,  
Clerk.

Filed Feb. 24, 1899.  
Supreme Court of the United States.

OCTOBER TERM, 1898.

423 re

In re Cases of the Cherokee Nation Pending in  
the Supreme Court of the United States.

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MOTIONS.

Wilkinson Call, attorney and of counsel for Cherokee Nation in all cases pending before the Supreme Court, moves the court for leave to enter H. W. Cockrell as his associate for the Cherokee Nation in the cases pending in this court, and for leave to file his brief in these cases, and to argue them before the court, and that thirty days' time be allowed for this purpose.

The motion is for leave to enter the name of A. W. Cockrell as associate counsel with Wilkinson Call for the Cherokee Nation, and for leave to file a brief from him to be heard in their cases.

The Cherokee National Council alone is competent to authorize attorneys to be employed and to appropriate money for their payment.

(2) The Principal Chief can have no authority without an act of the legislature. He can neither appoint

such attorneys and authorize suit to be brought or defended or expend money of the Tribe or Nation.

(3) The council or legislature enacted a law, herewith submitted as a part of the motion, by which they created a Delegation and appropriated twenty thousand dollars in general fund warrants for the payment of attorney's fees selected and contracted with by the Delegation.

The Delegation possessed under the law sole power and discretion in the selection of counsel and determining the amount of their compensation. An examination of the act leaves no room for doubt or equivocation on this subject. The language is—

“Should it become necessary for the Cherokee Nation or any citizen thereof to appeal to the courts of the United States upon any question involving the right of the Nation to self-government under treaty guarantees and agreements, the Delegation to Washington City are hereby authorized to select and employ for and in behalf of the Cherokee Nation such counsel as they shall deem to be required, and they are authorized to enter contracts accordingly with such counsel in the name and in the behalf of the Nation under the act passed in the Senate December 4, 1897, concurred in by council December 4, 1897. Approved December 4, 1897, by S. H. Mayes, principal chief.”

The delegation made the contract with Wilkinson Call and D. W. C. Duncan, copies of which are hereby submitted. The language of the contract is as follows: “They hereby employ the said Wilkinson Call in all cases that shall come before the Supreme Court of the

United States touching the validity of the acts of Congress of June 10, 1897, taking away the jurisdiction from the courts of the Cherokee Nation." Under this authority the said Wilkinson Call gave his time and attention to their business and has entered his name as their attorney in all their cases pending in the Supreme Court.

All of these cases touch the validity of the acts of Congress taking away jurisdiction from the Cherokee Nation. The question of the right of the citizens, and who are and who are not citizens, but intruders, involves a great part of the property of the Cherokee Nation and their tribal rights under the laws and Treaties of the United States.

It also presents the possibility of collusion and conspiracy between public officials and private citizens, and renders the question of the right of counsel chosen by them by an enactment of public law to be heard in their defense of great importance.

The Chief Mayes, whose telegram has been read here that Mr. Hutchings alone is authorized attorney in their cases, is the person who approved this act and has delivered four thousand dollars of general fund warrants in part performance of it by the Cherokee Nation.

Surely no further statement is needed.

The Cherokee Nation, one of the five civilized tribes, in 1897-1898, by a competent act of legislation, by their council or legislature, enacted the following act:

"An act making an appropriation, and for other purposes.

*Be it enacted by the National Council,* That the sum of five thousand dollars, or so much thereof as shall be necessary, is hereby appropriated, to defray whatever expenses may be incurred in the performance of the duties of the Principal Chief, as defined and imposed by act of the council approved November 29, 1897, and the Principal Chief is authorized to draw warrants accordingly, and in pursuance of the authority given him by said act to engage counsel, when necessary, and to pay whatever expenses may be incurred by the Cherokee Nation, as a party litigant in the defense of the rights thereof.

*Be it further enacted,* That should it become necessary during the business of the delegation for the Cherokee Nation, or any citizen thereof, to appeal to the courts of the United States, upon any question involving the right of the Nation to self-government under treaty guarantees and agreements, the delegation to Washington City are hereby authorized to select and employ for and in behalf of the Cherokee Nation such eminent and learned counsel as they shall deem to be required, and they are authorized to make contracts accordingly with such counsel, in the name and on the behalf of this Nation—the amount to be contracted, to be paid as fee for their services, being left to be determined by the said delegation, according to the circumstances and exigencies of the case, provided that the sum of twenty thousand dollars, or so much of it as shall be necessary, is hereby appropriated out of any money in the general fund not otherwise appropriated for the purpose of paying for the services of said counsel, according to any

contract made by the delegation herein authorized, and the Principal Chief is authorized to draw warrants in conformity with said contract or contracts.

Passed in the Senate, December 4, 1897.

J. C. DUNCAN,  
*Asst. Clerk, Senate.*

WOLFE COON,  
*President of Senate.*

Concurred in by council, December 4, 1897.

WILL W. ROSS, JR.,  
*Clerk, Council.*

E. B. WRIGHT,  
*Speaker pro. tem.*

Approved, December 4, 1897.

S. H. MAYES,  
*Principal Chief."*

"I, C. J. Harris, hereby certify that the above and foregoing one and a fraction pages is a full and true and complete copy of the original act as on file in this department.

This December the sixth, eighteen hundred and ninety-seven.

C. J. HARRIS,  
*Ex-Secretary."*

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In 1898, under this act of the legislature, a delegation was appointed to come to Washington City to contract with attorneys selected by them for the services mentioned in said act.

The said delegates were authorized to expend the twenty thousand dollars appropriated in said act in the payment of attorneys for said services. The said delegation employed the undersigned as their attorney and entered into the following contract with him :

"This contract, made on this twenty-fourth day of February, A. D. eighteen hundred and ninety-eight, be-

tween the undersigned delegates of the Cherokee Nation, parties of the first part, and Wilkinson Call, attorney-at-law, of Florida, party of the second part, witnesseth :

That said parties of the first part do hereby employ said Wilkinson Call as their attorney, to represent them in all cases that shall come before the Supreme Court of the United States touching the validity of the act of Congress of June 10, 1897, taking away the jurisdiction from the courts of the Cherokee Nation ; and further, to co-operate with other attorneys that may be employed, and hereby contract and agree to pay to said Wilkinson Call the sum of seven thousand dollars (\$7,000) in general fund warrants, as per appropriation of the Cherokee national council, approved December 4, 1897.

And the said Wilkinson Call agrees and contracts with them to give the said Cherokee Nation his professional services in the said cases, and in all matters in which they are interested in the present Congress of the United States, before the Departments of the United States, also before the President of the United States, and to oppose all measures detrimental to them. The said contract to extend to and through the next Congress.

And further, the said Wilkinson Call, party of the second part, agrees to do all in his power to obtain the passage of an act of Congress conferring jurisdiction upon the Supreme Court of the United States to decide the rights of the Indians of the Cherokee Nation under the treaties made with them, and requiring said court to entertain such jurisdiction, and finally decide all questions relating thereto.

The said Call also agrees to prepare a bill to be introduced in the Senate and House of Representatives of the United States, at the present session of Congress, to effect this declared object.



In witness whereof, we have this day and year first hereinbefore mentioned, set our hands and seals, in the city of Washington, D. C.

W. A. DUNCAN,  
*Chairman.*

LACEY HAWKINS,  
DANIEL REDBIRD,  
SKAKE MANUS,  
D. M. FAULKNER,  
STEPHEN TEHEE,  
S. R. WALKINGSTICK,  
JOE M. LAHAY,  
*Cherokee Delegation.*

WILKINSON CALL."

Witness :

.....  
.....

" UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA.  
*March 23, 1898.*

Personally came before me, W. H. Duncan, and acknowledged the foregoing signature to be his act and deed for the purpose herein mentioned, and also testifies that he was a witness to the other signatures, and that they were made in his presence and acknowledged by the parties signing the same.

W. H. DUNCAN.

Sworn to and subscribed before me this 23d day of March, 1898.

R. B. NIXON,  
*Notary Public."*

"Upon subsequent consideration, it appearing that the compensation to be paid to Wilkinson Call in pursuance of a contract entered into with him by the undersigned delegation for services as an attorney, the nature of said services being set forth in said contract, which is dated February 24, 1898, is somewhat inadequate to enable said Call to render the fullest services in the premises, it is hereby further agreed by and between said parties to said contract that said second party shall have and receive as additional compensation for said services therein named and set forth the sum of five hundred dollars in general fund warrants, as per appropriation of the Cherokee national council, approved December 4, 1897.

And it is hereby further agreed by and between said first and second parties that this agreement shall be taken and considered as a component part of the said agreement, dated as aforesaid, on February 24, 1898.

This 8th day of March, 1898.

WASHINGTON, D. C.

W. A. DUNCAN,  
*Chairman Delegation.*

STEPHEN TEHEE.  
DANIEL REDBIRD.  
D. M. FAULKNER.  
S. R. WALKINGSTICK.  
SKAKE MANUS.  
LACEY HAWKINS.  
J. A. LAHAY (absent).

WILKINSON CALL,  
*Party of second part."*

" CHEROKEE DELEGATION,  
WASHINGTON, D. C., *April 10, 1898.*

I hereby certify that seven thousand five hundred dollars (\$7,500) is due and payable at this date, and has been since the contract made with Wilkinson Call, attorney-at-law, by the Cherokee Nation, under the act of their council, and that said contract required the payment of said amount in warrants in the Treasury immediately after its execution ; and further, that said Call faithfully and diligently performed his part of said contract and rendered valuable services to said Cherokee Nation, and has the right to payment on that date in February 24, 1898, in registered warrants.

W. A. DUNCAN,  
*Chairman Cherokee Delegation.*

I hereby certify the foregoing to be a true copy of the originals.

WILKINSON CALL.

### **Reply to Mr. Hutchings' Brief.**

In his motion, Mr. William T. Hutchings, signing himself as attorney for the Cherokee Nation, moves that no one but himself shall be allowed by this court to represent the Cherokee Nation in these cases. The reasons he gives in support of this motion are : first, that the Cherokee national council passed the act under which Mr. Hutchings is representing them in citizenship cases in 1896, and the appropriation was exhausted in 1897, under the belief that *no appeal* would be had in such cases, or in other words that the act did not authorize an ap-

*peal*, and in 1897 the council passed the act for the employment of counsel to test the right of Congress to abolish the Cherokee government, etc. This, if true, has nothing to do with the subject. The subsequent act of 1897 took effect over all previous laws, whatever were their enactments.

The language of this act of 1897 speaks for itself and contradicts the statements of Mr. Hutchings. It says "*all cases*" in the Supreme Court touching the validity of the act of Congress, and it is prospective in its operation. The right to determine citizenship in the Indian Territory for the Cherokee Nation touches the validity of the act of Congress and the right of the Cherokee Nation guaranteed by treaty and agreement with the United States. The right to decide who are and who are not citizens is guaranteed to them by treaty. Their constitution and government provides that their council alone shall decide who are citizens. The treaty guarantees to them the removal of all *intruders* or non-citizens and the right of governing their Territory and people.

The act of Congress authorizes the Dawes commission to decide this, with a right of appeal to the United States courts. Nothing can be clearer than that this is a case touching the validity of the act of Congress and the right of the Cherokee Nation to self-government guaranteed to them by treaty and agreement.

If there was any doubt of this, which there is not, there is no reason, in the interest of the Cherokee Nation, why the other counsel employed by the delegation should not be heard and Mr. Hutchings be permitted to

exclude them from the case and from performing the duty entrusted to them.

The Chief Mayes statement is directly contradicted by the act which *he approved*, and has no force or significance ; and is also contradicted by the statement of facts made by Mr. Hutchings in his brief in support of his motion.

The Cherokee council did not entrust the Chief with authority to say who should be their attorneys and who should represent them, but gave this power to a *delegation*. The court will take judicial notice of the report made to Congress by the Secretary of the Interior of the danger of entrusting this power to the executive authority of the five civilized tribes. Eighty-five thousand dollars of fraudulent and spurious warrants of the Creek Nation were paid out of the Creek Trust Funds in the United States Treasury to alleged innocent holders under the collusive exercise of such a power.

See H. R. Doc. No. 499, 55th Congress, 2d Session, 1898.

The office of attorney and counsellor is to inform the court of facts and bring before them principles of law in the interest of the parties they represent, and the court will sometimes call on other counsel as *amicus curiæ* as is implied in the ancient phrase, *curiæ vult advisare*, with which the judges closed the hearing of argument, and there is no reason why counsel should not be heard even where there is doubt as to their authorized employment ; but in this case there is no doubt.

It is of great importance that this court should hear full argument and render final decision. The principles involved determine the final ownership of many millions of dollars in the Treasury of the United States belonging to the Cherokee Nation, and held in trust, which are subject to the decision of this court. It is competent for this court even to appoint counsel to represent these great interests, if necessary to do so, and to provide for their adequate payment, inasmuch as the money and property involved in these cases are a trust in the United States, and the opinion and judgment of this court in the exercise of the jurisdiction conferred by the act, if it be valid, is obligatory on Congress and final as to the rights of the Cherokee Nation and of citizens and intruders.

WILKINSON CALL,

D. W. C. DUNCAN,

*Attorneys for the Cherokee Nation.*

A. H. COCKRELL,

*Associated Counsel and*

*Attorney for the Cherokee Nation.*

N. 423.

OFFICE SUPREME COURT U. S.

FILED

FEB 23 1899

JAMES H. MCKENNEY

*Motion to strike out counsel re*

*Filed Feb. 23, 1899.*  
IN THE

**Supreme Court of the United States**

**OCTOBER TERM, 1898.**

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WM. STEPHENS ET ALS., APPELLANTS,

vs.

CHEROKEE NATION, APPELLEE.

---

No. 423, AND ALL OTHER CASES vs. CHEROKEE  
NATION INVOLVING CITIZENSHIP.

---

**MOTION.**

Now comes William T. Hutchings, attorney for appellee, and moves the court to strike out the names and appearance of Wilkinson Call and D. W. C. Duncan as attorneys of record for appellee, as they are not authorized to appear in this case.

WILLIAM T. HUTCHINGS,  
*Attorney for Appellee.*



## EVIDENCE IN SUPPORT OF MOTION.

### TELEGRAM.

Dated Tahlequah, I. T., Febr'y 16, 1899.

To W. R. HUTCHINGS,

*Metropolitan Hotel, Washington, D. C.:*

You are the only authorized attorney to represent Cherokee Nation in citizenship cases.

S. H. MAYES,

*Principal Chief, Cherokee Nation.*

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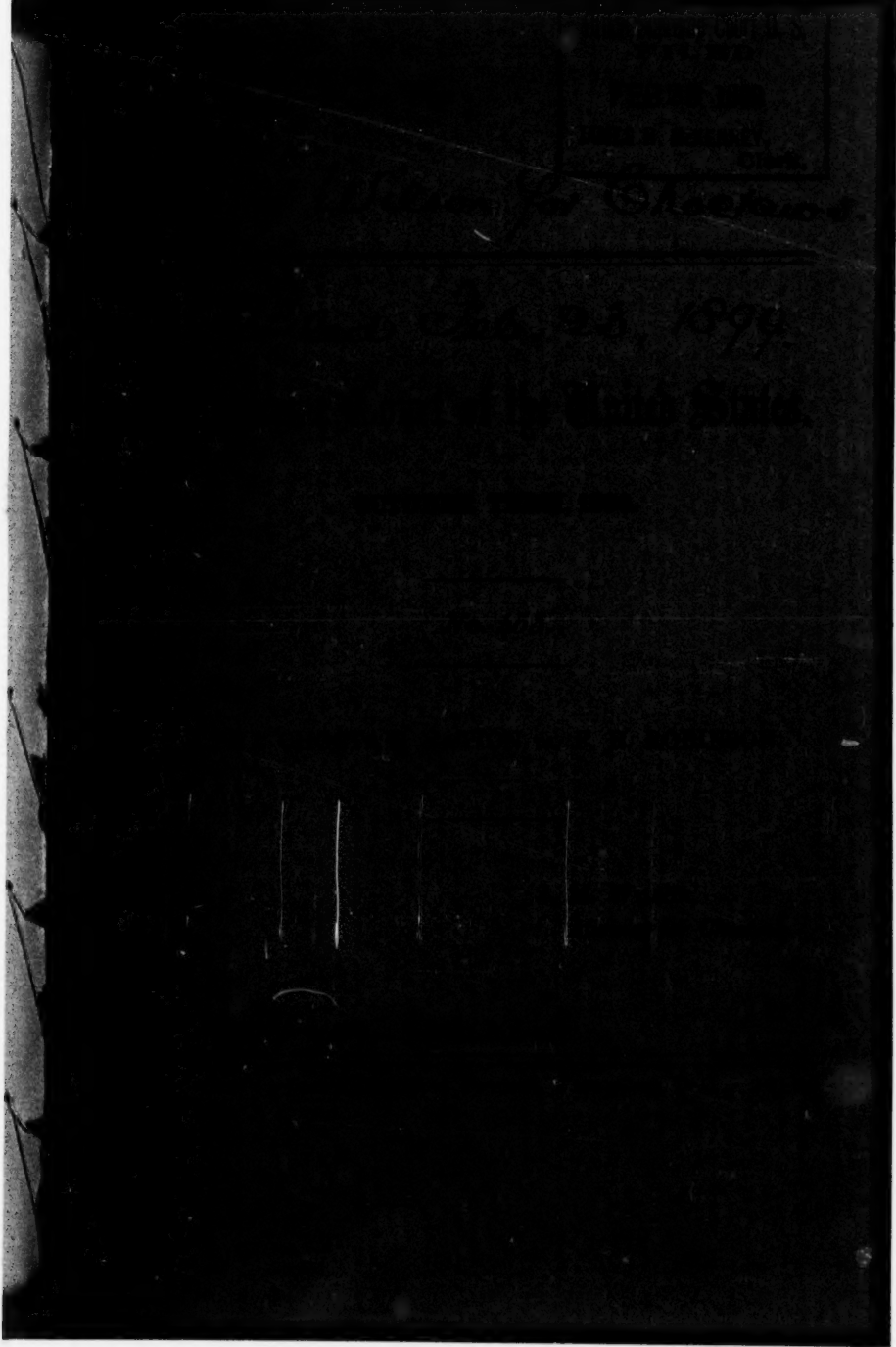
## BRIEF IN SUPPORT OF MOTION.

The facts in this matter are that the Cherokee council passed the act under which counsel is representing it in citizenship cases in 1896, and the appropriation was exhausted in 1897 under the belief that there would be no appeal in such cases. The Indian appropriation bill of 1897 provided that after January 1, 1898, all jurisdiction should be taken away from the Indian courts. This struck at the foundation of their right of self-government. So the council of the Cherokee nation at once made an appropriation in 1897 for the employment of counsel to test the right of Congress to abolish the Cherokee government and to deprive its courts of all their functions. Mr. Wilkinson Call, D. W. C. Duncan, Wm. P. Thompson, the undersigned, and the firm of Stuart, Lewis, Gordon & Rutherford were employed to test this, and several cases are pending with

that view, in all of which Mr. Call has a right to appear. His employment had no reference to citizenship cases. The law bringing them to this court was not passed until June, 1898, and long after his employment in the other matters. None of the other counsel employed are contending that they have any right to appear in these cases. The undersigned has been sole counsel in the citizenship cases since they have been pending in the Federal courts, as the records show.

Respectfully submitted.

WILLIAM T. HUTCHINGS,  
*Attorney for the Cherokee Nation.*



IN THE  
**Supreme Court of the United States.**

**OCTOBER TERM, 1898.**

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*No. 453.*

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THE CHOCTAW NATION *vs.* F. R. ROBINSON.

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STATEMENT.

I.

On the 7th of September, 1896, applicant, F. R. Robinson, applied to the commission known as the Dawes commission to be enrolled as an intermarried citizen (R., p. 1).

II.

His petition shows that he is a white man ; that he married an Indian woman of Choctaw and Chickasaw blood September 21, 1873.

III.

This Indian wife died, and he married a white woman August 10, 1884, with whom he now lives.

IV.

To this petition the Choctaw Nation made the objections (a) that the commission had no jurisdiction because the act

of Congress creating the commission is unconstitutional and void ; (b) that the applicant had not applied for citizenship to the tribunal of the Choctaw nation constituted to try questions of citizenship ; (c) that his right to be enrolled as a citizen was forfeited by his remarriage (Rec., pp. 3, 4).

## V.

The Dawes commission granted the petition (Rec., p. 4).

## VI.

From this action of the commission the Nation appealed to the United States court for the central district of the Indian Territory (R., p. 5), alleging that claimant had married a Choctaw woman, who died ; that he afterwards married a white woman not a citizen of the Choctaw nation.

## VII.

The claimant filed in the court a certificate dated June 2, 1897, that he is enrolled as a citizen by intermarriage (R., p. 7), but when he was enrolled does not appear.

## VIII.

The case was referred to a master, who reported that plaintiff was married in the Choctaw nation to a Choctaw woman, according to the laws of the nation, September 21, 1873 ; that his wife died April 1, 1884, and he afterwards (August 10, 1884) married a white woman (R., p. 8).

The court adjudged him to be a citizen (R., p. 9).

Assignment of errors will be found (R., p. 10).

## I.

This record presents one of the questions involved in these Choctaw citizenship cases, viz :

CAN THE UNITED STATES DETERMINE WHO SHALL BE A CITIZEN OF THE CHOCTAW NATION, OR IS THAT A RIGHT THAT RESTS EXCLUSIVELY IN THAT NATION ?

This question is common to all the cases before this court.

As to this question—

By the act approved June, 1896, 29th Stats., 339, and the amendment of June 7, 1897, — Stats., 84, provision was made to determine the right to citizenship in the Choctaw nation by the “ Dawes commission ” in the first instance and on appeal by the Federal court.

The Choctaw Nation contends that the United States has not the right to determine who shall be citizens of that nation, but that this is a right that vests in that nation exclusively as the sovereign.

The right to be citizens of this nation is of very great importance because of the fact that it is now contemplated to terminate the Indian government, and in that event the lands or their proceeds must be divided among the citizens when the national existence is destroyed. The number of persons between whom the division shall be made is of serious consequence.

This contention of the Choctaws is based on the character of their ownership of the land and their right to govern themselves, in all respects, subject only to such legislation by Congress as is provided for by the Constitution.

(a.) The relation between Indian tribes or nations and the United States has been often before this court.

They have been denominated domestic dependent nations.

*Cherokee Nation vs. Georgia*, 5 Pet., 1.

It has been held that they are States in a certain sense, although not foreign States or States of the United States within the meaning of the Constitution.

Holden *vs.* Joy, 17 Wall., 211.

Warren *vs.* Joy, 17 Wall., 253.

"They were and always have been, regarded as having a semi-dependent position when they preserved their tribal relations: not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, *with the power of regulating their internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

U. S. *vs.* Kagama, 118 U. S., 381, 382.

Generally the Indian title is that of occupancy. The ultimate fee is in the United States. But this title by occupancy has always been considered one that the Indians had a right to enjoy.

It has always been recognized as a property right by the United States.

But the Choctaws hold the lands now occupied by them by a very different tenure.

They held by the title by occupancy a vast tract of land east of the Mississippi river.

From time to time they made cessions to the United States diminishing the area.

But by the treaty of 1820 (7 Stats., 211, sec. 2), in consideration of a cession of a portion of their lands east of the Mississippi, the United States ceded to them a tract west of that river within specific boundaries.

That was an absolute cession, and vested the lands in the Choctaw nation. They acquired not a mere right of occupancy, but an absolute title.

In 1830 another treaty was made with them (7 Stats., 333); they ceded their entire country east of the Mississippi



to the United States, and the United States agreed to convey to them, and afterwards by patent did convey to them, "*in fee-simple to them and their descendants,*" the lands they now occupy, which had been ceded to them by the treaty of 1820.

They are not, therefore, holding their lands by the Indian title of occupancy, but in fee.

In 1855 another treaty was made with them (11 Stat., 611).

By article I the boundaries of the Choctaw and Chickasaw country are defined, and then follows this :

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the *members* of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common ; so that each and every member of either tribe shall have an equal, undivided interest in the whole."

Again, in 1866, a treaty was made with them (14 Stats., 769), article II of which recites that the land occupied by them "is now held by the members of said nations in common," under the provisions of the treaty of 1855, from which quotation has been made above.

So that there can be no dispute that they hold this territory not by occupancy, but in fee.

## II.

### THE STATUS OF THE CHOCTAWS AND CHICKASAWS AS NATIONS.

The United States had made five treaties with the Choctaws prior to 1820, above referred to—viz., in 1786, 1801, 1802, 1803, 1805, and 1816—and had made five treaties with the Chickasaws.

By the treaty of 1830 (7 Stats., 333), the United States having ceded by article I this country in fee, as above stated, by article IV, it is stipulated that—

“The Government and people of the United States are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw nation of red people and their descendants; and no part of the land granted them shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw nation from and against all laws except such as from time to time may be enacted in their own national councils not inconsistent with the Constitution, treaties, and laws of the United States, and except such as may and which *have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian affairs.*”

The Choctaws then had a written constitution, a government divided into executive, legislative, and judicial departments. The Chickasaws had not; but the latter nation having by the treaty of 1837 acquired from the Choctaws an interest in these lands, it was by the treaty of 1855 (11 Stat., 612), article IV, provided that “the government and “laws now in operation and not incompatible with this instrument shall be and remain in full force and effect within “the limits of the Chickasaw district until the Chickasaws “shall adopt a constitution and enact laws,” &c.—that is, the laws made by the Choctaws should be the laws for the Chickasaws until the latter formed a government of their own and enacted laws of their own.

Article VII of this treaty of 1855 provides that *so far as compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over person and property within their respective limits.*

By article X of the treaty of 1866 (14 Stat., 774) the United States reaffirmed "all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations entered into prior to the late rebellion," &c., and provided in section XI for taking lands in severalty "should the *Choctaw and Chickasaw people through their respective legislative councils*" so agree.

And further, by article XXXVII, "the legislatures of the said nations were authorized to fix the amount that should be paid out of the funds of other Indians who might remove into their territory and make selections of lands."

And again, by article XLIII, "all persons except agents, &c., of the Government, &c., are excluded from this territory unless formally incorporated and *naturalized* by the joint action of the authorities of both nations into one of said nations of Choctaws and Chickasaws according to their laws, customs, or usages."

And, finally, by article XLV, all their "rights, privileges, and immunities" under former treaties and legislation are declared to be "in full force."

As already stated, the Choctaws had a government under a written constitution, with executive, legislative, and judicial departments, prior to the treaty of 1855. Since that time they have adopted a new constitution, providing for a similar division, and under which this territory was divided into judicial districts, and since 1855 the Chickasaws have adopted a constitution by which a similar government was organized. These governments are still in existence.

They have their legislative assemblies, their executive, and their courts of justice, and the United States, by the treaties above mentioned, have stipulated that they should make their own laws and have their courts to adjudicate all matters appertaining to their persons, property, and rights. The laws of no State or Territory were ever to be extended over them, nor was the Government of the United States to legislate with respect to them, except so far as re-

quired by the Constitution of the United States; and this condition was to continue so long as they maintained their tribal or national existence.

We have, then, a complete nationality—a complete government—occupying a territory that they purchased for a valuable consideration, and their citizens are subject alone to its jurisdiction and control. They are independent of congressional legislation, except the power to regulate commerce.

But the power of Congress to regulate commerce does not include the power to determine who shall or shall not be citizens of the Choctaw and Chickasaw nations. Every nation has the right for itself to determine who shall be its citizens, and this must be especially so in this case, because ordinarily citizenship only confers political rights and obligations, while in the case of the Choctaws citizenship not only confers political rights, but confers property rights as well.

Therefore, if the United States can confer citizenship in these nations, it is by that act granting to the party upon whom it is conferred a property interest in the lands of these Indians, thereby seriously affecting the rights of others. And in this connection I venture to state as a part of the history of the times of which the court will take judicial notice (and the fact appears in the cases before the court) that as soon as it was indicated that this Territory was to be divided among these tenants in common, either by allotment or sale or both, thousands of persons immediately claimed citizenship who had never claimed it before, and many Choctaws (of whom more hereafter) who remained east of the Mississippi river, and the descendants of such who never resided in the Choctaw nation west of the Mississippi and never were there, are now applying to be enrolled as citizens, although non-residents, to the end that they may share in this division.

What the Choctaws insist upon is that through their own

courts or their own legislative counsel and by their own laws they may decide who are entitled to be enrolled as citizens of the nation. The right to do this is a substantial right guaranteed to them by the treaty provisions to which attention has already been called, and is a right that involves property interests that cannot be stricken down by the United States without their consent.

This right has never been surrendered. If it has been taken away from them, it has been by the arbitrary act of the United States.

We cannot contend, in the light of the *Cherokee Tobacco Case* and the case of *Thomas vs. Gay*, 169 U. S., 264, and others, that Congress cannot repeal a treaty by a statute.

Have the treaty provisions which secure to them self-government and in which is involved the determination of citizenship been repealed? If so, it is only by the Dawes Commission act.

No act of Congress will be given the effect of repealing these treaty provisions unless it is clearly so intended. Such a repeal by implication will not be favored.

In the Indian appropriation act of the 3d of March, 1893 (27 Stats., 645), the commission now known as the Dawes commission is provided for. The President is authorized to appoint three commissioners to negotiate with the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles "for the purpose of the extinguishment of the national or tribal title to any lands within the territory now held by any and all of such nations or tribes, either by the cession of the same or some part thereof to the United States or by the allotment and division thereof in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same or by such other method as may be agreed upon, \* \* \* with a view to such adjustment, upon the basis of justice and equity as may, with the consent of such nations or tribes of Indians, so far as may be

"necessary, be requisite and suitable to enable the ultimate  
"creation of a State," &c.

The act then proceeds to provide for the salaries of the commissioners, the appointment of a secretary, stenographer, and interpreter, the regulations and duties of the commission, and gives the commissioners power to negotiate agreements to effectuate the purpose for which the commission was created.

In the appropriation act of June 10, 1896 (29 Stats., 339), the duties of said commission were enlarged. The commission "is further authorized and directed to proceed at once to  
"hear and determine the applications of all persons who may  
"apply to them for citizenship in any of said nations, and  
"after such hearing they shall determine the right of such  
"applicant to be so admitted and enrolled: *Provided, how-*  
*ever, \* \* \** That in determining all such applications  
"said commission shall respect all laws of the several na-  
"tions or tribes not inconsistent with the laws of the United  
"States and all treaties with either of said nations or tribes,  
"and shall give due force and effect to the rolls, usages,  
"and customs of each of said nations or tribes." This sec-  
"tion further provides that—

"The rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, *may apply to the legally constituted court or committee designated by the several tribes for such citizenship,* and such court or committee shall determine such application," &c.

The section then prescribes the powers of the commission in this regard, and provides for an appeal by the tribe or person aggrieved from the decision of the commissioners to the United States district court, the decision of said court to

be final. After some further provisions regarding the duties of the commission, the act provides:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof."

The provision last above quoted is the only provision in the act creating the Dawes commission or the act enlarging the powers and duties thereof that in any way touches upon the assumption of jurisdiction over the Indians and their lands by the United States. There is no express abrogation of the rights and jurisdiction guaranteed to the Indians themselves by the treaties already set forth. Therefore if these treaty provisions conferring exclusive jurisdiction upon the Indians of their lands and themselves are annulled and repealed, it can only be by implication.

In Endlich on the Interpretation of Statutes, pages 280, 281, it is said that—

"Repeal by implication is not favored. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is a rule, founded in reason as well as in abundant authority, that in order to give an act not covering the *entire ground* of an earlier one *nor clearly intended as a substitute* for it the effect of repealing it the implication of an intention to repeal must clearly flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying the evident intent and meaning, find for it a reasonable field of operation, preserving at the same time



the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

"In the absence of any repealing clause it is, however, "necessary to the implication of a repeal that the object of "the statutes as well as the subject be the same" (Am. and Eng. Ency. Law, vol. 23, p. 482). The object of the statute in the present case is not to take away the jurisdiction of these Indian nations over their citizens. The commission is appointed only for the purpose of negotiating with the Indians and securing their consent to the ultimate assumption of jurisdiction and the creation of a State by the United States, and these acts are not intended by Congress as an interference with the right of the Indians to determine their own citizenship.

It is respectfully submitted that by the legislation in question the right of self-government has not been repealed, and if not, then the right to determine citizenship rests in that nation, and the Dawes commission and the court on appeal or as a matter of original jurisdiction was without lawful authority to conclude the nation or to interfere with its sovereign authority in this respect.

*The Mickle Case.*

Record No. 449 :

STATEMENT.

Harmon Mickle, a white man, married Susanna Morris, a Choctaw by blood, in 1847. Susanna died and her husband, Harmon, in 1852, married Joanna McSweeney, a white woman, in Arkansas. *Joanna* makes claim to be enrolled as a citizen.

The other claimants are—

*Nicholas Mickle*, a son of Harmon and Joanna.

*Nora Mickle*, wife of Nicholas.

*Lawrence Mickle*, son of Nicholas and Nora.

*John Mickle*, son of Nicholas and Nora.

*William Mickle*, son of Harmon and Joanna.

*Peter Mickle*, son of Harmon and Joanna.

The six children of Christopher C. Payne and Joanna Margaret Payne (*née* Mickle), deceased, to wit:

Daisy L. Payne.

Louis O. Payne.

Jessie H. Payne.

Joanna M. Payne.

Willie E. Payne.

Gussie L. Payne.

All of the above were adjudged to be entitled to enrollment.

Harmon Mickle is dead. Joanna, the white woman who was married to him in Arkansas, is making claim of citizenship, and her children by that marriage and grandchildren are likewise making such claim. There is no Indian blood in any of them.

The whole of these claims therefore rest upon the citizenship of Joanna. If she was not a citizen, none of the others are. Her marriage to Harmon Mickle was in direct contravention of the act of the Choctaw council approved October, 1840. (See Pamphlet of Opinions, p. 28.)

That act is as follows:

"SEC. 4. That no white man shall be allowed to marry in this nation, unless he has been a citizen (evidently meaning a resident) of this nation for two years.

*"And be it further enacted,* That he shall be required to procure a license from some judge, or the district clerk, and be lawfully married by a minister of the gospel, or some other authorized person, before he shall be entitled and admitted to the privileges of citizenship.

*"And be it further enacted,* Should any officer or minister of the gospel who are authorized to marry in this nation, perform such marriage ceremony, not agreeable to this act, he shall be made to pay a fine of one hundred dollars," &c.

By this act it will be seen that citizenship by virtue of such a marriage is expressly prohibited, and the minister or officer who solemnizes a marriage without a license procured, &c., as the act directs, is liable to punishment. It is therefore impossible that the marriage in this case could entitle the party or her descendants to be enrolled as citizens.

#### THE CUNDIFF CASES.

No. 644.

In this record will be found a number of cases that were consolidated and tried together in the court below.

They are specified on pages 43, 44.

The claimants Nancy Lee Caudiff, Mattie Lee Armstrong, Bonnie Durant Armstrong, and Layton Burford Armstrong were admitted to citizenship by an act of the Choctaw general council approved November 8, 1895.

There is no controversy as to them (R., pp. 46, 47).

The claimants Varina Davis Potts, Mary J. Potts, Edward Potts, Robert J. Caudiff, Robert S. Caudiff were by the court adjudged to be citizens by blood.

The claimant William G. Potts was adjudged not to be entitled to citizenship, because he was not married in conformity with the marriage laws of the nation (R., p. 50).

This applicant, William G. Potts, married Varina Davis Cundiff in Texas September 25, 1897, pursuant to a license issued by the clerk of Wise county September 24, 1897 (R., pp. 19, 20). His application was denied.

The other claimants, thirty in number (and the children of J. Q. Ward and Maggie Ward), are non-residents of the Territory, and their applications were rejected (R., p. 51).

The questions here presented are, first, whether a white man who has married a woman of Choctaw blood in the State of Texas, according to the laws of Texas, and not

according to the laws of the Choctaw nation, is entitled to enrollment as a citizen.

The Choctaw law on the subject will be found at page 28 of the Pamphlet of Opinions, and is elsewhere quoted in this brief.

In the light of this law, which the Choctaws undoubtedly had the right to enact, the marriage in Texas could not make this white man a member of the Choctaw nation.

2d. The second question presented by this record is, ARE THESE NON-RESIDENTS ENTITLED TO BE ENROLLED AS CITIZENS ?

There is nothing to indicate that any one of them ever *lived* in the nation or in any way affiliated with the Choctaw people.

The treaty provisions bearing on this subject are so elaborately considered in the opinion by Clayton, J., that it is deemed unnecessary to do more than to refer to that opinion (pp. 4 to 21, inclusive, and 24 to 27, inclusive, and 27 to 38, inclusive).

But there are other reasons why some of these parties are not entitled to be enrolled.

James Daly makes claim because he married Sarah Caroline Durant, a sister of Nancy Lee Cundiff, who was made a citizen by act of council (R., p. 9).

He married in Texas. He swore to his application in Texas, and he lives in Texas. He was not married according to the requirements of the laws of the Choctaw nation, which has been considered in another connection.

The case of Horace F. Butts is similar to that of Daly (R., p. 22).

The case of James Quincy Ward is of the same character (R., pp. 31, 32).

## THE NABORS CASE.

No. 648.

The claimants in this case are "*Mississippi Choctaws*." They never resided in the Indian Territory (R., p. 11). They are of those who elected to remain east of the Mississippi. All of the treaty provisions affecting this class of cases are set forth in the opinion of Clayton, J, which will be found in the pamphlet before alluded to (R., pp. 4-21, inclusive) and to which reference is made. They elected to remain in Mississippi and became citizens of that State. They never subjected themselves to the government of the Choctaw nation or assumed any duties or obligations to that nation. Any rights they might have had by removing they abandoned by not removing.

*Eastern Band of Cherokees*, 117 U. S., 288.

## SUMMARY.

The records in the cases herein considered, it will be observed, present the following questions:

1st. Whether the Dawes commission can so determine the question of citizenship as to bind the Choctaw nation?

2d. Whether the Mississippi Choctaws, still living in Mississippi, are entitled to be enrolled as citizens?

3d. Whether other non-residents are so entitled.

4th. Whether white men who have married women of Choctaw blood outside the nation and not in conformity with its laws are entitled to be enrolled.

There are other questions involved in cases now before the court arising out of article 38 of the treaty of 1866.

"Article 38. Every white person who having married a Choctaw or Chickasaw resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

Under this article the following questions arise :

1st. Are its provisions applicable to any white persons other than such as had already married persons of Choctaw blood ?

It is submitted that the very language shows that it only applies to marriages theretofore contracted : "Who *having* married, *resides*," &c., \* \* \* "or who *has* been adopted," &c., both obviously events of the past.

Such white persons are to be *deemed members of the nation*, &c.

2d. Now, for what purpose or to what extent were they to be so deemed ?

Before that treaty such persons were not subject to the criminal laws of the Choctaw nation, and this was placed in the treaty to make such a person subject to said laws, and to prosecution, trial, and punishment "according to their laws." It was for this that he was to be deemed a citizen and not to confer upon him property rights.

3d. This provision does not extend to any white person other than the one who had then married a Choctaw. But if that white person subsequently married another white person, the latter would not be made a citizen by the terms of this treaty provision.

It is the marriage of a white man or woman to a *Choctaw* that makes such white person a member, and a *white* person cannot become a member by marrying a *white* person after the death of the Choctaw husband or wife by reason of the marriage to whom the membership existed.

The marriage that will give membership must be that of a white person to one of Choctaw blood.

Another question that is presented in some of these cases grew out of conditions that arose after the treaty of 1866. To illustrate: Suppose a Choctaw man to have married a white woman. He died. Then this white woman married a white man. That white man was not subject to Choctaw laws.

The United States authorities could not or would not remove him from the nation because he was married to a member of the nation.

If he committed an offense he must be tried in Arkansas, with all the attendant inconvenience, expense, etc.

To remedy this the Choctaw council enacted the statute of 1875, the fifth section of which is as follows:

"Should any man or woman a citizen of the United States or of any foreign county become a citizen of the Choctaw nation by intermarriage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship unless he or she shall marry a white man or woman or person as the case may be having no rights of Choctaw citizenship by blood, and in that case all his or her rights acquired under the provisions of this act shall cease."

(The entire act will be found at pp. 29, 30, 31, of the Pamphlet of Opinions.)

The Choctaw council had the right to enact such a law.

After this enactment no citizen of the United States or of any foreign country could become a citizen of the Choctaw nation by marriage, except upon complying with its provisions, viz: He must procure a license from a clerk or



judge ; he must show that he has not a wife ; he must show good moral character ; he must take an oath to support the constitution and laws, etc.

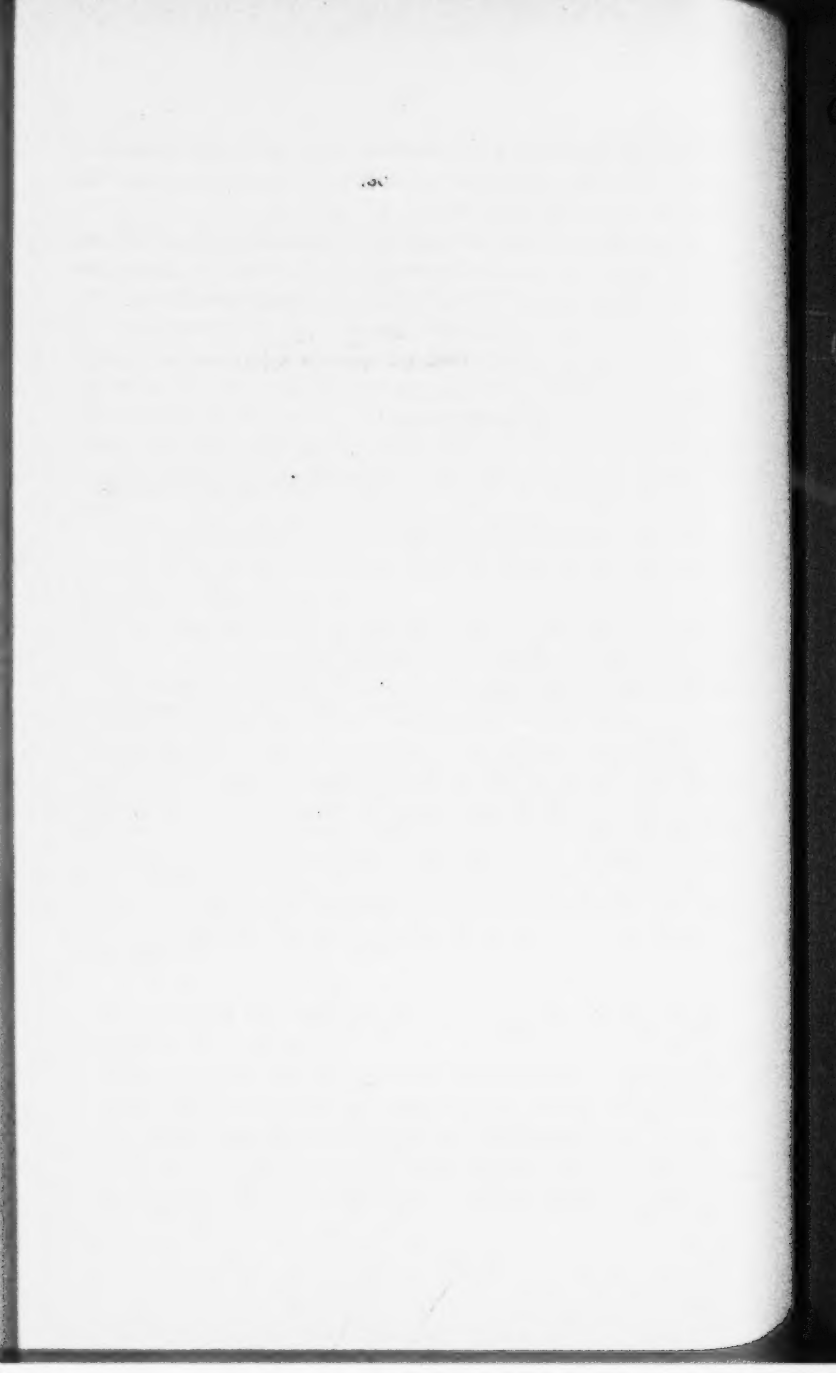
Married according to these provisions made him a citizen. But if he or she married a white man or woman having no right of citizenship by blood, his citizenship terminates. He decitizenizes himself by that act.

Persons who are within any of the classes above mentioned are not entitled to enrollment.

Respectfully submitted.

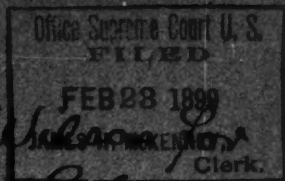
J. M. WILSON,

*Attorney for Choctaws.*



N<sup>o</sup> 453 vs.

App<sup>y</sup> to Dir. of Wilson for



Choctaws.

Filed Feb 28, 1899.

## OPINIONS

CLAYTON, J.,

IN

CHOCTAW CITIZENSHIP CASES.

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## CHOCTAW CITIZENSHIP CASES.

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There are upon the docket of this court, appealed from the commission to negotiate with the five civilized tribes, known as the Dawes commission, two hundred and forty-one cases, involving the right of citizenship in the Choctaw nation of about twenty-five hundred applicants.

All of these cases have been by my predecessor, Judge Lewis, placed on the equity side of the docket, and in the case of Mary A. Sanders, No. 63, a motion to transfer to the law side of the docket was filed and argued and by him overruled. It is not my purpose in these cases to disturb or to go back and open up questions already decided, but to adopt the past rulings of the court and to proceed as rapidly as possible to a final disposition of them. In passing I will remark, however, that it seems to me that the peculiarity of these cases—the many suits brought by persons having a common interest and a common purpose against the same defendant, the difficulties of enforcing the rights by judgments at law, and the many equities claimed by both parties to these suits—make them proper cases for a court of equity.

The question of the jurisdiction of this court to hear and determine these cases has been raised by the pleadings. The counsel on neither side, however, have seen fit to press this question or to point out, either by brief or oral argument, the reasons for this contention. The statute giving the court jurisdiction is plain and I know of no constitutional objections. It has been said, however, that Congress does not possess the power, under the Constitution, to give to the courts of the United States appellate jurisdiction over the final orders and awards of commissions and other such

tribunals. This very question was raised in the case of *The United States vs. Ritche*, decided by the Supreme Court of the United States and reported in vol. 58, U. S. Sup. Ct. Rep., page 524. In that case the proceedings were originally commenced before a board of commissioners to settle private land claims in California under an act of Congress of March 3, 1851. Provisions were made by the act at the suit of the losing party for an appeal to the United States district court for the northern district of California. The board decided the case in favor of the claimant and against the Government. The United States appealed, in accordance with the provisions of the statute, to the aforesaid district court, where it was again tried *de novo*, and an appeal regularly taken to the United States Supreme Court. In that court the question of the jurisdiction of the district court to try the case was raised. The contention is stated in the opinion. In deciding the case the court say :

"It is also objected that the law prescribing an appeal to the district court from the decision of the board of commissioners is unconstitutional, as this board, as organized, is not a court, under the Constitution, and cannot, therefore, be vested with any of the judicial powers conferred upon the General Government.

"But the answer to this objection is that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; but we must not, however, be misled by a name, but look to the substance and intent of the proceedings. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board, they being made evidence in the district court, and also upon such further evidence as either party may see fit to produce."

Following this decision, I will, in these cases, proceed as if they were originally brought in this court, try them *de novo*, and give to all of the parties all of the advantages of an original suit—that is, all cases brought here in conformity with the statute.

It is, therefore, ordered by the court that the claimants to the right of citizenship in these cases may have fifteen days from this date—that is, until the — day of July, 1897—in which to take and file further proof, and that the Choctaw nation may have immediately thereafter fifteen days in which to take and file further rebuttal proof—that is, from the said — day of July, —, until the — day of July, 1897—and that all legal testimony heretofore taken and filed with the so-called Dawes commission shall be considered as competent proof on the trial of these cases.

And that the trial of all of these cases, except such as may be disposed of otherwise, is hereby set for trial on Tuesday, the — day of —, 1897.

These cases naturally divide themselves into six heads or classes, to wit:

1. As to the right to citizenship of those Choctaws who, under the treaty of 1830, decided to remain in the State of Mississippi, called "Mississippi Choctaws," and have not since removed into the present Choctaw nation. No appeal necessary on the part of the Choctaw nation.

2. As to the right to citizenship of those Mississippi Choctaws who have, since the treaty of 1830, removed into the present Choctaw nation. Same memo.

3. As to the right to citizenship of others who are not Mississippi Choctaws, who have removed from the Choctaw nation into the States, and are now residing there. Same memo.

4. As to the right to citizenship of white men having married Indian women, in violation of the marriage laws of the Choctaw nation. Same memo.

5. As to the right of white men to citizenship, by virtue of a legal marriage to Choctaw women, and residence in the Choctaw nation, had become lawful citizens, but their Indian wives having afterward died, they married for their second wives white women.

6. As to the right to citizenship of white men who, having married Choctaw women, in violation of the Choctaw laws, afterward remarry the same women in conformity with their laws.

There are submitted to the court for final hearing, on the proof already taken, cases involving all of the above questions, which I will now proceed to decide in the order following:

# I.

JACK AMOS ET AL.	} No. 158.
<i>vs.</i>	
THE CHOCTAW NATION.	

In this case the proof shows that the claimants are Choctaw Indians by blood, now living in the State of Mississippi; that neither they nor their ancestors have ever removed into the present Choctaw nation.

The claimants base their right to be enrolled as Choctaw citizens upon the terms of the second and fourteenth articles of the treaty negotiated at Dancing Rabbit creek, on September 27, 1830, and of the conditions of the patent to the lands of the Choctaw nation, executed by President Tyler in the year 1842 (Durant Ed. Choctaw Laws, page 31).



Articles 2 and 14 of the treaty of 1830 are as follows:

"Article 2. The United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington city, in the year 1825. The grant to be executed so soon as the present treaty shall be ratified.

"Article 14. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half of that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee-simple shall issue; said reservation shall include the present improvements of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."

The conditions of article 2 of the treaty that the land should be conveyed "to the Choctaw nation in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," are carried into the patent, and are the only portions of that instrument which shed

any light on the question now being considered, and therefore article 2 and the conditions of the patent may be considered together.

The whole object of the treaty of 1830 was to procure the removal, as far as practicable, of the Choctaw people to the lands west of the Mississippi which they now occupy. The Supreme Court of the United States, in the case of *The Choctaw Nation vs. United States*, 119 U. S., 36, after reviewing the treaties of 1820 and 1825, say :

"In the meantime, however, under the pressure of the demand for settlement of the unoccupied lands of the State of Mississippi by emigrants from other States, the policy of the United States in respect to the Indian tribes still dwelling within its borders underwent a change and it became desirable, by a new treaty, to effect, as far as practicable, the removal of the whole body of the Choctaw nation, as a tribe, from the limits of the State, to the lands which had been ceded to them west of the Mississippi river. To carry out that policy, the treaty of 1830 was negotiated."

Again, in the same case, page 27, the court say :

"It is notorious as a historical fact, as it abundantly appears from the records of this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal."

Article 3 of the treaty of 1830 stipulates that the Choctaws agree to remove all of their people during the years 1831, 1832, and 1833 to those lands (7 Stat. at Large, 333).

Article 14 of the treaty, however, provides for certain privileges and rights for those who might choose to remain in Mississippi with a view of becoming citizens of that State. They and their descendants were to receive certain lands, and after living on them for five years, intending to become citizens of the State, those lands were to

be granted to them in fee-simple. Then follows this very peculiar clause:

"Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever *remove*, are not to be entitled to any portion of the Choctaw annuity."

The difficulty in construing this clause of the treaty is to ascertain the meaning of the word "remove." To what does it relate and how shall we give it meaning? It certainly does not purpose to impose a penalty on the Choctaw who may choose to remove for removing, and for that reason forfeit his right to the annuity, because so long as he remained in Mississippi he was not entitled to any annuity, and therefore, by removing, he could not forfeit that which he did not have. If he removed he was to have no annuity and if he remained he was to have no annuity. It is evident, therefore, that the word was not used for the purpose of forfeiting the annuity in case of removal. Then what are its uses? The very object of the treaty was to procure a removal of these people. The whole of the Choctaw nation, with all of its sovereignty, its powers, and its duties, was to be transferred beyond the Mississippi. It was to exercise its powers, confer its privileges, and maintain the citizenship of its people in another place. Those who were left behind were to retain not this Choctaw citizenship, but only the "privileges of a Choctaw citizen"—that is, that when they put themselves into a position that these privileges could be conferred upon them they were to have them; and, under the conditions and purposes of this treaty, how would it be possible for them to put themselves in such a position without first removing within the territorial jurisdiction of the Choctaw nation and within the sphere of its powers? What privilege would it be possible for the Choctaw nation to confer or a Mississippi Choctaw to receive so long as he remained in Mississippi and out of the limits of the Choctaw nation? By the very terms of

the treaty they were to become citizens of another State, owing allegiance to and receiving protection from another sovereignty. If one Mississippi Choctaw were to commit a wrong against the person or property of another, the right would be enforced and the wrong redressed under the laws of Mississippi. The Choctaw nation would be powerless to act in such a case. \* The Choctaws in that State cannot vote, sit as jurors, or hold office as a Choctaw citizen or receive any other benefit or privilege as such. They cannot participate in the rents and profits of the lands of the Choctaw nation, because by the very terms of the grant the Choctaw people and their descendants must live upon them. If they do not, it is an act of forfeiture, made so by the provisions of article 2 of the treaty of 1830, and also of those of the patent to their lands, afterwards executed.

The title of the Choctaw people to their lands is a conditional one, and one of the conditions of the grant, expressed in both the second article of the treaty of 1830 and the patent, is that the grantees shall live upon them. And who are the grantees? Who are these people who are to live upon the land? Unquestionably, the Choctaw people and their descendants; for, while the grant is to the Choctaw nation, the people seem to be included, both as grantees and beneficiaries. The language of the treaty is, and it is carried into the patent:

"The President of the United States shall cause to be conveyed to the Choctaw nation, a tract of country west of the Mississippi river, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it."

The Choctaw nation is not "them" and cannot have "descendants," and while it may exercise its sovereignty and its national powers within certain defined territorial limits, it cannot "live on land." Those provisions of the grant which are expressed in the plural and attach to "descendants" and which require as a condition that the land

shall be lived on, beyond doubt, refer to the Choctaw people and their descendants. Whatever effect upon the title the limitation upon the right of alienation expressed in the patent, so that the lands cannot be sold except to the grantor or by its consent, may have, there can be no question but that the second article of the treaty of 1830, negotiated twelve years before the execution of the patent, and in which no limitation on the right of alienation is expressed, was intended to convey a fee-simple title, burdened by two conditions subsequent, the one that the grantees should continue the corporate existence of their nation, and the other that the people of that nation and their descendants should forever live upon the land. A failure of either would work a forfeiture of the title to the grantor.

Now, why was it that this fee-simple title was to be burdened by the condition that the grantee must live on the land? In the light of the knowledge of the conditions that then existed the answer is plain. The policy of the Federal Government at that time, relating to the Indian tribes, was to move them upon a reservation and keep them there, and if the Indians, either singly or in numbers should stray off, soldiers with guns and bayonets were used to drive them back. This very treaty was negotiated with the Choctaws for that very purpose. Hence the condition in the grant that they should live on the land or it should be subject to forfeiture to the United States. This condition was inserted for two reasons: First, to compel the grantees to remove upon the lands; and, second, to compel them to remain on them after removal. It was not intended that some should go and locate on the lands and hold the title for themselves and also for the others who should choose to remain. This would defeat the very object of the condition. These lands were conveyed to the Choctaw people, to be held by them as tenants in common. This intention of the second article of the treaty of 1830 is expressed by the use of the words "them and their descendants" and of the clause that they

were to "live on the land." Both of these clauses are expressed in the plural, and evidently do not relate to the nation as a corporate body. That a tenancy in common was intended is made clear by a consideration of section 3 of an act of Congress entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi river," approved May 28, 1830 (4 U. S. Stat. at Large, 412). The section reads as follows:

*"And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs, or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."*

At the time the treaty of 1830 was negotiated (September 29, 1830) this act had been on the statute books of the United States for four months, and, as a matter of course, the commissioners to negotiate the treaty were familiar with it. But the language used in this act to limit the estate is "to them, their heirs or successors." The language used in the treaty to limit the estate therein granted is "in fee-simple to them and their descendants," and then conditions are attached not named in the statute. Why the word "successors" was left out of the treaty is plain. But why the word "heirs" was changed to the word "descendants," unless it was that a word should be used within the comprehension of those untutored Indians who knew nothing of the technical phrases of the common law used in the conveyance of real estate, is not easy to determine. The word "successors" was omitted from the treaty because, by its terms, the Choctaw nation was to have no successors.

They were to live on the land forever or it should be forfeited to the grantor. When the technical words "successors" and "heirs" were dropped and the common word "descendants" was used, these Indians could understand it. They knew what they and their offspring were. It was to them, the people and their children, that the land was sold, and when the condition was added that the grant was to be made to them and their descendants only in the event that they should live upon the lands they could not but understand that this implied a removal to and a continual residence upon them.

As a further evidence that the parties understood that by this transaction the land was to be held in common by the people the treaty of 1833, article 1, provides, after describing the lands, as follows:

"And, pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole. *Provided, however,* No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same" (4 U. S. Stat. at Large, 276).

If this be true, there is no holding in trust by the corporate body of the Choctaw nation for the benefit of the people, but the people themselves have the title and hold it in common.

"A tenancy in common is a joint estate, in which there is unity of possession, but separate and distinct title. The tenants have separate and independent freeholds or leaseholds in their respective share, which they manage and dispose of as freely as if the estate was one in severalty. \* \* \* The interest of one tenant in common is so independent of that of his cotenant, that, in a joint conveyance



of the estate, it would be treated as a grant to each, of his own share of the estate" (Tiedeman on Real Property, 235).

And therefore any condition of the grant would be as binding on each of the tenants in common as if the estate was in severalty and vested in the individual tenant, and therefore the condition named in the second article of the treaty of 1830 and in the patent that "they shall live on the land" is binding individually upon each and upon all of the grantees.

In the third article of the treaty the Choctaws agreed to move all of their people within three years, and the United States intended that they should go; but, by the fourteenth article of the treaty, provisions were made whereby those who should decide to remain and become citizens of the State of Mississippi in the event that because of the intolerance and persecutions of the whites which they themselves had so bitterly experienced or for any other cause might become dissatisfied with their altered conditions and their new citizenship and desired to follow them to their new homes and thereafter exercise with them in their own country the privileges of citizenship they could do so, except that they were not to participate with them in their annuities, the lands which they were to receive in Mississippi being deemed a compensation for that.

When the fourteenth article of the treaty was framed, the negotiating parties understood that the policy of the United States was that the Choctaws were to be removed. The Choctaws, in article 3, had just agreed that they should all go. The ink was not yet dry in article 2, whereby the condition was placed in this grant to the lands, that they were to live upon them or they should be forfeited, and that no privilege of citizenship could be conferred or enjoyed outside of the territorial jurisdiction of their newly located nation. Understanding these conditions, the latter clause of article 14 was penned, "Persons who claim under

this article shall not lose the privilege of a Choctaw citizen, but if they ever remove (that is, if they ever place themselves on the land and within the jurisdiction of the nation whereby those privileges may become operative) they are not to be entitled to any portion of the Choctaw annuity." In other words, if they ever remove they are to enjoy all of the privileges of a Choctaw citizen except that of participating in their annuities. If this be not the meaning to be attached to the word "remove" as used in the clause of the treaty under consideration, it must be meaningless; but, in the interpretation of statutes, it is the duty of the court to so interpret them as to give to every word a meaning, and in doing so it must take into consideration the whole statute, its objects and purposes, the rights which are intended to be enforced, and the evils intended to be remedied; it may go to the history of the transaction about which the legislation is had and call to its aid all legitimate facts proven or of which the courts will take judicial notice in order to find the true meaning of the word as used in the statute. Of course, the same rule of interpretation applies to treaties. Adopting these rules in the interpretation of article 14 of the treaty of 1830, I arrive at the conclusion that the "privilege of a Choctaw citizen" therein reserved to those Choctaws who shall remain, thereby separating themselves, it may be, forever from their brethren and their nation, becoming citizens of another sovereignty and aliens of their own, situated so that it would be impossible, while in Mississippi, to receive or enjoy any of the rights of Choctaw citizenship, was the right to renounce his allegiance to the Commonwealth of Mississippi, move upon the lands conveyed to him and his people, and there, the only spot on earth where he could do so, renew his relations with his people and enjoy all of the privileges of a Choctaw citizen except to participate in the annuities.

As an evidence that the Choctaw people themselves took this view of the question, attention is called to the fact that

their council has passed many acts and resolutions inviting these absent Choctaws to move into their country, and on one occasion appropriated a considerable sum of money to assist them on their journey, and, until the past two or three years, have always promptly placed those who did return on the rolls of citizenship, but never enrolled an absent Choctaw as a citizen.

On December 24, 1889, the general council of the Choctaw nation passed the following resolution :

"Whereas, there are large numbers of Choctaws yet in the States of Mississippi and Louisiana, who are entitled to all the rights and privileges of citizenship in the Choctaw nation; and

"Whereas, they are denied all rights of citizenship in said States; and,

"Whereas, they are too poor to immigrate themselves into the Choctaw nation : Therefore,

*"Be it resolved by the general council of the Choctaw nation assembled, That the United States Government is hereby requested to make provisions for the emigration of said Choctaws from said States to the Choctaw nation," etc.*

The language is not that they are entitled to the rights and privileges of Choctaw citizenship in the States named, but "who are entitled to all the rights and privileges of citizenship in the Choctaw nation," and the prayer is that because of the fact that they are denied the rights of citizenship in the State that the United States will remove them to a place—their own country—where the rights of Choctaw citizenship may be enjoyed by them.

As a further evidence of the fact that all of the parties to the treaty—the United States, the Choctaw nation, and the Mississippi Indians themselves—have always understood that the Mississippi Choctaws were entitled to none of the rights of a Choctaw citizen so long as they remained in that State, attention is called to the fact that the lands in Mississippi which were ceded to the United States by the

Choctaw nation by virtue of the treaty of 1830 were, under the laws of the United States, sold. The Choctaw nation claimed that they had never been paid any consideration for them, and that the United States justly owed them the net proceeds arising out of the sale. For many years this contention was carried on before the departments of the Government, commissions, and other tribunals. Finally, by treaty, it was submitted to the Senate of the United States for decision. That body found in favor of the Choctaw nation. The case then went to the Court of Claims, and from there to the United States Supreme Court, in which court judgment was finally rendered for nearly \$3,000,000. This judgment was rendered in November, 1886. The money was turned over to the Choctaws by the United States, and by them, with the knowledge and consent of the United States, divided among their own people who lived in the nation. Not one farthing of it was ever paid to an absent Mississippi Choctaw, and no portion of it was ever claimed by them. During this whole litigation, running through many years, no effort was made to make themselves parties to the suit. And when the money was finally paid to the Choctaw authorities, to be divided among the people, they made no claim for any part of it, and entered no protest to its being paid to the resident Choctaws, nor have they brought suit for their share since. The other party to the treaty, the United States Government, the guardian of these Indians, paid the money over without making any provision for the Mississippi Choctaws to get their share, or intimating that anything was due them. When it is remembered that this money was the proceeds of the sale of the lands in Mississippi belonging to the united Choctaw people while they lived in that State, and that the great bulk of the Mississippi Choctaws had never received one farthing for their share in the lands, if they, living in Mississippi, are entitled there to the rights of a Choctaw citizen, it is remarkable that they did not assert their rights.

Again, a few years ago the interest of the Choctaws to lands lying west of their present boundaries was sold by them to the United States for a considerable sum of money. This, like the other, was promptly divided among the resident Choctaws with the knowledge and consent of the United States and without protest or claim of the Mississippi Choctaws. If they are entitled to the privilege of Choctaw citizens, without removing into the boundaries of the nation, they are and were entitled to their *pro rata* share of this money. If they do not understand that they have no claim to the rights of citizenship without moving into the country, why have they for the past sixty-five years silently stood by and permitted these kind of transactions to be had without claim, protest, or suit?

The Eastern band of Cherokees, now residing in North Carolina, sustained a relationship to the Cherokee nation almost identical to that sustained by the Mississippi Choctaws to the Choctaw nation. Like the Mississippi Choctaws, there were some among them who were averse to moving to their new country west of the Mississippi river. Provisions were made for them by the treaty of New Echota (the treaty of 1835) between the Cherokee nation and the United States, similar to those with the Choctaws by the treaty of 1830. When the Cherokee people moved to the present home of the Cherokees these remained behind in North Carolina, where they have ever since resided. Like the Choctaw treaty of 1830, the treaty of New Echota provided that their lands should be ceded to them and their descendants, etc. The Cherokee nation, by virtue of a treaty with the United States, afterward sold some of these lands. The Eastern band of Cherokees in North Carolina, unlike their Mississippi Choctaw brethren, promptly demanded their *pro rata* of the proceeds of this sale, and, upon being denied, at once sought and obtained permission of the United States to sue the Cherokee nation in the Court of Claims for this money, and also in the same suit to

sue for another fund, which was created by the treaty of New Echota, consisting of certain annuities in the sum of \$214,000, of which the Eastern band of Cherokees claimed a *pro rata* share. The suit was brought, and the Court of Claims, in a very elaborate and learned decision, decided against the right of the Eastern band of Cherokees to recover, upon the ground that those Cherokees, by the act of remaining in North Carolina, had alienated themselves from the Cherokee nation to such an extent that they could not claim any of the rights of a Cherokee citizen without moving into the Cherokee nation, and there being readmitted in accordance with the constitution and laws of that nation. The case was appealed to the Supreme Court of the United States, and there the decision of the Court of Claims was affirmed (*Eastern Band of Cherokees vs. United States*, 117 U. S., 288). In that case the Supreme Court, after reviewing all of the treaties and statutes relating to the matter, concluded by saying:

"If Indians in that State (North Carolina) or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee nation, and be readmitted to citizenship as there provided. They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated, by the constitution of the Cherokees and were intended by the treaties with the United States, for the benefit of the united nation, and not in any respect for those who had separated from it and become aliens to their nation. We can see no just ground on which the claim of the petitioners can rest in either of the funds held by the United States in trust for the Cherokee nation."

It seems to me that this decision of the Supreme Court, founded on a case so nearly similar to the one at hearing,

conclusively settles the contention in favor of the Choctaw nation. Indeed, in that case, the Supreme Court expresses a very strong intimation that those provisions of the treaty of New Echota relating to and providing for those Cherokees who should refuse to move west were confined in their operation to that class of Cherokees then *in esse*, and the rights conferred by those provisions of the treaty did not descend to their offspring; that the descendants of those Cherokees did not succeed to the rights of their ancestors under the treaty. The language of the Supreme Court is:

"Nor is the band (Eastern band of Cherokees), organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west and preferred to remain and become citizens of the States in which they resided, were promised certain moneys, but there is no evidence that the petitioners have succeeded to any of these rights. The original claimants have probably all died, for fifty years have elapsed since the treaty of 1835 was made, and no transfer from them to their legal representatives is shown" (*ib.*, 310).

The court proceeds, however, to decide this case, as heretofore shown, on the ground that the Indians composing the Eastern band of Cherokees had not removed into the Cherokee nation and reassumed their citizenship under the constitution and laws of that nation.

I am disposed to the opinion, however, and will so hold that the descendants of the Mississippi Choctaws, by virtue of the fourteenth article of the treaty of 1830, are entitled to all of the rights of Choctaw citizenship, with all of the privileges and property rights incident thereto, provided they have renounced their allegiance to the sovereignty of Mississippi by moving into the Choctaw nation in good faith to live upon their lands, renewing their allegiance to that nation, and putting themselves in an attitude whereby they will be able to share in the burdens of their Govern-



ment. The reason for this conclusion is, to my mind, made morally certain when it is remembered that ever since the treaty of 1830, now for the period of nearly sixty-seven years, with the exception of the past two or three years, the Choctaw nation, by its legislative enactments and by its acts, so long continued that by custom they have become crystallized into law, have universally admitted all who should remove to this country and rehabilitate them in all of the rights and privileges of citizenship enjoyed by themselves.

The counsel for the claimants lay considerable stress on the effect of the provisions of article 13 of the treaty of 1866 between the United States and the Choctaw nation (14 Stat. at Large, —).

By the eleventh and twelfth articles of that treaty a scheme was devised by which the lands of the Choctaw and Chickasaw nations were to be surveyed and divided and allotted to the individual Indians, provided the councils of the respective nations should agree to it, which, however, they have refused to do. A land office was to be established at Boggy Depot, in the Choctaw nation. When all of the surveys were completed maps thereof were to be filed in the said land office, subject to the inspection of all parties interested, and immediately thereafter notice of such filing was to be given for ninety days, calling upon all parties interested to examine said maps, to the end that errors in the location of occupancies, which were to be noted on the maps, might be corrected. Then followed article 13 of the treaty, which is as follows:

"Article 13. The notice required in the above article shall be given, not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the States of Mississippi and Tennessee, Louisiana, Texas, Arkansas and Alabama, to the end that such Choctaws and Chickasaws as yet remain outside of the Choctaw and Chickasaw nations may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws. *Provided*, That before any such absent Choctaw or Chicka-

saw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become *bona fide* resident in the said nation within five years from the time of selection. And should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land shall thereafter be discharged from all claim on account thereof."

From an examination of this article of the treaty it will be seen that the Choctaws and Chickasaws recognized the right of absent members of their nations to participate in the allotment and the subsequent ownership of their lands to the same extent as they themselves enjoyed, but on conditions, however, first, that they should satisfy the register of the land office of their intention to become *bona fide* residents in the said nation within five years from the time of said selection; and, second, that within the said five years they should actually remove into the said nation; here is a statute of limitation; and, third, that within the said five years they should occupy and commence an improvement upon the selected lands.

It will be observed that this latter clause imposes a condition on absent Indians nowhere required of the resident ones by any clause of the treaty. They were required to remove into the country and show their good faith and their intention to remain *bona fide* citizens of the nation by actual occupancy of the land and an expenditure of money in its improvement. The notice was to be given them in order that they might have an opportunity of removing into the nation and there residing and resuming their rights as citizens; but care was to be taken and safeguards provided by which their removal was to be actually had, and that it was to be done in good faith: First, the register of the land office was to be convinced, by such proof as might satisfy him, of the intention of the absent Indian to become a *bona fide*

resident of the nation before he was allowed to make a selection; and, second, that was to be followed by an actual occupancy and improvement of the land, and if he failed in this it worked a forfeiture of his rights. Nowhere within the whole treaty is any right recognized or conferred on an absent Indian, except on the condition that he shall remove into the nation, and the right is not to be consummated or enjoyed until after actual removal. No treaty or act of the Choctaw council or of any officer of the Choctaw nation since the treaty of 1830 can be cited, or at least I have not found them, whereby any right or privilege has been conferred, granted, or recognized in or to a Mississippi Choctaw so long as he shall remain away from his people, but there are an infinitude of such acts and conduct granting and recognizing such rights and privileges to him after he shall have removed.

The provisions of the treaty of 1866, so far from being an authority in favor of the contention of claimants, seems to me to be strongly against them.

To permit men with, perchance, but a strain of Choctaw blood in their veins, who, sixty-five years ago, broke away from their kindred and their nation and during that time or the most of it have been exercising the rights of citizenship and doing homage to the sovereignty of another nation, who have borne none of the burdens of this nation and have become strangers to the people, to reach forth their hands from their distant and alien home and lay hold of a part of the public domain, the common property of the people, and appropriate it to their own use, would be unjust and inequitable.

It is therefore the opinion of the court that absent Mississippi Choctaws are not entitled to be enrolled as citizens of the Choctaw nation.

The action of the Dawes commission is therefore **AF-  
FIRMED**, and a decree will be entered for the Choctaw nation.

## II.

E. J. HORNE	} No. 11.
vs.	
THE CHOCTAW NATION.	

In this case the pleadings and proof show that the claimant is a Mississippi Choctaw, and that prior to his application to be enrolled he had in good faith moved into the Choctaw nation, and on the 9th day of September, 1896, filed with the Dawes commission his application to be enrolled as a Choctaw citizen; that he is a Choctaw by blood.

The act conferring jurisdiction on the commission to negotiate with the five civilized tribes, called the "Dawes commission," entitled "An act making appropriation for current and contingent expenses of the Indian Department, etc.," approved June 10, 1896 (Stat. at Large, 1895-'6, page 339), among other things provides that "every application for citizenship must be made to the commission within three months after the passage of the aforesaid act;" and therefore, the claimant in this case having complied with that provision of the statute, and being a "Mississippi Choctaw," and having returned to the Choctaw nation in good faith, under the rule laid down in the decision just rendered in the case of Jack Amos *et al. vs.* Choctaw Nation, he is entitled to be enrolled as a Choctaw citizen, unless the fact that he is a Choctaw of less than one-eighth blood shall deprive him of that right.

On November 5, 1886, the following act of the Choctaw council was approved and went in force:

"AN ACT entitled An act defining the quantity of blood necessary for citizenship."

"SEC. 1. *Be it enacted by the General Council of the Choctaw nation assembled;* That hereafter all persons, non-citizens of the Choctaw nation, making or presenting to the

general council, petition for rights of Choctaws in this nation, shall be required to have one-eighth Choctaw blood, and shall be required to prove the same by competent testimony.

"SEC. 2. *Be it enacted*, That all applicants for rights in this nation shall prove their mixture of blood to be white and Indian.

"SEC. 3. *Be it further enacted*, That no person convicted of any felony or high crime shall be admitted to the rights of citizenship within this nation.

"SEC. 4. *Be it further enacted*, That this act shall not be construed to affect persons within the limits of the Choctaw nation, now enjoying the rights of citizenship.

"SEC. 5. *Be it further enacted*, That this act shall take effect and be in force from and after its passage" (Durant Digest, p. 266).

By the fourteenth article of the treaty between the United States and the Choctaw nation, negotiated on the 27th day of September, 1830, as interpreted by this court in the aforesaid case of Jack Amos *et al. vs. The Choctaw Nation*, all Mississippi Choctaws and their descendants were entitled, upon their removal to the Choctaw nation, to all of the privileges of a Choctaw citizen, except to the right to participate in their annuities. This right of citizenship being conferred by the treaty, no law afterward enacted by the Choctaw council can deprive them of that right, because it would be in conflict with the treaty which confers that right to them and their descendants without reference to the quantity of Indian blood. If they are descendants of Choctaw ancestors, it is sufficient. As to them, therefore, the law does not apply.

In this case the claimant is entitled to be enrolled as a Choctaw citizen. The decision of the Dawes commission is and judgment will be entered for the claimant.

## III.

SIDNEY J. CUNDIFF	}	No. 109.
<i>vs.</i>		
THE CHOCTAW NATION.		

The proof in this case shows that the claimant is a Choctaw Indian by blood; that on the 1st day of January, 1887, he moved from the Choctaw nation into the State of Texas, where he has ever since resided and still resides. On the 7th day of September, 1896, he filed his application for citizenship with the Dawes commission. The case is regularly appealed to this court.

The question in this case is, Can a Choctaw Indian who has moved off of the Choctaw lands and into one of the States, where he now resides, be placed upon the rolls of Choctaw citizenship without first removing into the Choctaw nation and upon their lands?

The very object of the treaty of 1830, between the Choctaws and the United States (7 Stat. at Large, p. 333), was to secure the removal of the Choctaw people to the lands they now possess west of the Mississippi river. So held by the Supreme Court of the United States in the case of *The Choctaw Nation vs. The United States*, 119 U. S., 36-7. By the second article of that treaty granting the lands now held by the Choctaw nation to them, as well as by the terms of the patent afterward executed by the United States, two conditions subsequent were attached to the grant; one that the Choctaw people shall thereafter continue to exist as a nation, and the other that they shall live upon the land.

In the case of *Jack Amos et al. vs. Choctaw Nation*, decided at the present term, it was held that the condition that they should live on the land applied to the Choctaw people individually, as well as collectively. It was attempted to be shown in that case, and I think successfully, that the object of this condition was to prevent these Indians

from straying away from their lands by imposing a forfeiture of the title as to all who should do so; that the individual Indian must himself live on the land; that one of the effects of this condition is to prevent the holding of the lands by an Indian in actual possession for others out of possession, as can be done in ordinary tenancy in common when there are no conditions attached to the grant; that the Choctaw people being tenants in common of the land, as declared by the eleventh article of the treaty of 1866 between the United States and the Choctaw nation (14 Stat. at Large, —), any conditions of the grant would be binding on each of the tenants individually; and therefore, if any Choctaw after having once moved on the land should afterward abandon it or move off of it and live elsewhere, this would be a breach of the condition—such a one as would work a forfeiture to the title.

But there is another condition to the grant, set out both in the second article of the treaty of 1830 and of the patent. It is that these grantees, these tenants in common, shall not only live on the land, but they shall exist as a nation or their title shall be forfeited. Now, each one of these tenants in common possesses all of the rights and is entitled to all of the privileges and is required to perform all of the duties relating to the land that each of the others is entitled to and must perform, and therefore, if one shall be allowed to abandon the land or cease to live on it, each and all of the others may do the same thing; and if they should exercise the same right and move off of the land and out of the nation, what would become of its existence? The individual Choctaw who moves away from his people, abandons their lands, and separates himself from the sphere of their political organization as a nation is not performing his part of the condition that these people shall "exist as a nation." He is also violating the very object of the treaty and the policy of the Federal Government, as well as of his own.

In my opinion, as long as he remains away from the na-



tion and the lands, under these circumstances, he forfeits his right to that citizenship which he has abandoned and which carries with it the right to the land; that the Choctaw nation, in the exercise of its sovereign power, has the right to refuse to place him on its rolls of citizenship.

In the language of the Supreme Court of the United States, in the case of *The Eastern Band of Cherokees vs. United States*, 117 U. S., 331:

"They (the Indians) cannot live out of its (the nation's) territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the fund and common property of the nation."

It cannot be disguised that these Indians who are living away from the nation in the States and are now seeking to be enrolled without removing upon their lands are doing so for the purpose alone of sharing with those who, true to their treaty obligations, have remained, the land in this nation which they expect soon to be allotted, and it is possibly true that the object of the Government in causing these rolls to be made is that they shall be used as a basis of allotment. To allow these Indians who have abandoned their lands and their people, who have and do refuse to perform the duties of Choctaw citizenship, without any intention on their part to resume their relations with their people, to remain away in violation of every duty of citizenship and against the very terms of the deed to the lands which they now seek to possess themselves of, without performing the conditions, is not just and it is not the law.

As to all such Indians who may have, in good faith, returned to the Choctaw nation with the intention of resuming their relations of citizenship, I think they are entitled to do so, unless the Choctaw statute of November 6, 1886 (*Durant's Dig.*, 266), has the effect of disqualifying from that date all of those who may have less than one-eighth Choctaw blood. This question I do not now decide.

The court is therefore of the opinion that the claimant in this case is not entitled to enrollment, and the action of the Dawes commission is affirmed, and judgment for the Choctaw nation.

## IV.

W. R. SENTER	}	No. 234.
vs.		
THE CHOCTAW NATION.		

The facts of this case, as found by the master in chancery and not excepted to, are as follows:

That claimant, a white man, was married December 25, 1889, in the State of Texas, according to the laws of that State, to a registered Choctaw woman by blood, and that he is a resident of the Choctaw nation, but that he was not married in conformity with the Choctaw laws relating to marriage.

The question in this case is: Is this marriage to this Indian woman, followed by a residence in the nation, so far valid as to confer upon the white husband the rights of citizenship in the Choctaw nation?

Article 38 of the treaty of 1866 (14 Stat. at Large, —) is as follows:

"Every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

At the time of the negotiation and ratification of the treaty of 1866 the following act of the Choctaw nation approved October, 1840, was in force in that nation, to wit:

"AN ACT in relation to white men marrying in the nation, etc.

"SEC. 4. *Be it enacted by the General Council of the Choctaw nation assembled:* That no white man shall be allowed to marry in this nation, unless he has been a citizen (evidently meaning a resident) of this nation for two years.

"*And be it further enacted,* That he shall be required to procure a license from some judge or the district clerk and be lawfully married by a minister of the gospel, or some other authorized person, before he shall be entitled and admitted to the privileges of citizenship.

"*And be it further enacted,* Should any officer or minister of the gospel who are authorized by law to marry in this nation, perform such marriage ceremony not agreeable to this act, shall be made to pay a fine of one hundred dollars for each offence, and the money shall be put into the district treasury in which said marriage ceremony may have taken place.

"*And be it further enacted,* That no white man who shall marry a Choctaw woman shall have the disposal of her property without her consent and any white man parting from his wife without just provocation, shall forfeit and pay over to his wife such sum or sums as may be adjudged to her by the district court for said breach of the marriage contract, and be deprived of citizenship."

Of the four clauses in the above act the last is the only one that is in conflict with the provisions of the treaty above cited. The treaty provides that the marriage and residence in the Choctaw nation shall place the married man in every respect as if he were a native Choctaw. The last clause of the act puts him in a different attitude than that of the Indian. There was no law of the Choctaw nation at that time providing that the penalty therein mentioned should be imposed on an Indian by blood for deserting his wife, and therefore, if the act should stand, the white married man would not be situated in all respects as a native Choctaw; hence there is a conflict between the treaty and the act, and of course the provisions of the treaty must prevail; and

therefore so much of the act as is contained in this last clause must be considered as having been repealed by the treaty. But I observe no reason why the other three clauses of the act should not stand unrepealed as the law in force in the Choctaw nation until some other act of the council or treaty shall have repealed it.

There was another act of the Choctaw council relating to white men marrying Indian women, in force at the time of the ratification of the treaty of 1866, to wit:

"SEC. 15. *Be it enacted by the General Council of the Choctaw nation assembled:* That every white man who is living with Indian woman in this nation without being lawfully married to her, shall be required to marry her lawfully, or be compelled to leave the nation.

"*Be it further enacted,* That no white man who is under a bad character will be allowed to be united to an Indian woman in marriage in this nation under any circumstances whatever. (Approved Oct., 1849.)"

Surely this most salutary act was not in conflict with the treaty. It required, as does the act now in force to be presently cited, that the white man should be of good character before he could marry one of their Indian women, and thereby secure the right of citizenship in their nation.

After the ratification of the treaty of 1866, on the — day of —, 1875, the following act was passed by the Choctaw council and approved by the governor:

"1. *Be it enacted by the General Council of the Choctaw nation assembled:* Any white man, or citizen of the United States, or of any foreign government, desiring to marry a Choctaw woman, citizen of the Choctaw nation, shall be and is hereby required to obtain a license for the same from one of the circuit clerks or judges of a court of record, and make oath or satisfactory showing to such clerk or judge, that he has not a surviving wife from whom he has not been lawfully divorced; and unless such information be freely furnished, to the satisfaction of the clerk or judge, no license shall issue; and every white man or person applying for a license as herein provided, shall, before obtaining the same,

be required to present to the said clerk or judge, a certificate of good moral character, signed by at least ten respectable Choctaw citizens by blood, who shall have been acquainted with him at least twelve months immediately preceding the signing of such certificate; and before any license as herein provided shall be issued, the person applying shall be and is hereby required to pay to the clerk or judge the sum of twenty-five dollars, and be also required to take the following oath: 'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Choctaw nation, and will neither claim nor seek from the United States Government, or from the judicial tribunals thereof, any protection, privilege or redress, incompatible with the same as guaranteed to the Choctaw nation by the treaty stipulations entered into between them, so help me God.'

"2. Marriages contracted under the provisions of this act shall be solemnized as provided by the laws of this nation, or otherwise shall be void.

"3. No marriage between a citizen of the United States, or of any foreign nation, and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided, shall be legal, and every person who shall engage and assist in solemnizing such marriage shall, upon conviction, be fined fifty dollars, and it shall be the duty of the district attorney in whose district such person resides to prosecute such person before the circuit court, and one-half of all fines arising under this act shall be equally divided between the sheriff and the district attorney.

"4. Every person performing the marriage ceremony under the authority of a license provided for herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in whose behalf it was issued, who shall, within thirty days therefrom, place the same in the hands of the circuit clerk, whose duty it shall be to record the same and return it to the owner.

"5. Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw nation by intermarriage, as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship; unless he or she shall marry a white man or woman or person as the case may be, having no rights of Choctaw citizenship by blood; in that case all

his or her rights acquired under the provisions of this act shall cease.

"6. Every person who shall lawfully marry, under the provisions of this act, and afterwards abandon his wife or her husband, shall forfeit every right of citizenship, and shall be considered an intruder, and removed from this nation, by order of the principal chief."

It is contended that this act is in violation of the treaty, because no forms or ceremonies of marriage or conditions are in the treaty prescribed, and hence any marriage to a Choctaw, if legal where made, must be held to be a legal marriage in the Choctaw nation, and therefore must carry with it the right to Choctaw citizenship—that is, a marriage in Texas, solemnized as provided by its laws, being a legal marriage there, is, by the law, a legal marriage everywhere, and therefore a legal one in the Choctaw nation, which, by the terms of the treaty, carries with it Choctaw citizenship. Is this contention correct?

The fifth and sixth sections of the act relate to conditions that may arise after the marriage, and therefore have nothing to do with the question now being considered, and, for the purposes of this case, may be discarded.

The first section of the act provides that a white man, before he will be permitted to marry an Indian woman, must procure from the proper officer a marriage license, and, before obtaining the license, he must show, by his own oath or other satisfactory proof, that he has not a surviving wife from whom he has not been lawfully divorced; he shall further be required to present to the officer a certificate of good moral character, signed by at least ten respectable Choctaw citizens by blood, who shall have been acquainted with him at least twelve months; he is further required to pay a fee of \$25 (afterward changed to \$100 by act of council approved November 10, 1887), and, finally, he is required to take an oath of allegiance to the Choctaw nation. The above-cited provisions are all of the requirements of

the act, so far as the white man is concerned, relating to the marriage. The ceremony of the marriage may be performed by any person and in any manner known to the law. All that is required is:

"1. That no white man having a living wife shall impose himself upon their women and live a bigamous life with them.

"2. That they shall be of good moral character.

"3. That they shall pay the fee for the license; and,

"4. That they shall, before being naturalized, take the oath of allegiance."

There is not a provision in it that is not required by every civilized nation on earth, under similar circumstances, both as relating to the marriage and to the naturalization. Is it possible that by mere inference, because the treaty is silent as to the ceremonies or as to the place of the marriage, that a tribe of Indians is to be deprived of the right to inquire into the character of strangers and aliens who seek to marry their daughters, and through this method to become their fellow-citizens and equally share with them their lands and property? Are they to be deprived of the right to require of these aliens the poor pittance of an oath binding them to their allegiance? If this is true, what becomes of the sovereignty of the Choctaw nation? Every sovereign power has the right to pass upon the qualifications of its own citizens and to prescribe terms for those who seek citizenship with them. It is said that the Choctaw nation is a limited and a dependent sovereignty; but it is only limited and dependent in so far as its powers are circumscribed by the Constitution, laws, and treaties of the United States.

By the seventh article of the treaty of 1855, which is still in force, it is provided that—

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the



Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and the full jurisdiction over persons and property within their respective limits; excepting, however, all persons, with their property, who are not, by birth, adoption or otherwise, citizens or members of either the Choctaw or Chickasaw tribe."

This provision of the treaty seems to give to the Choctaws and Chickasaws the right to regulate marriage and prescribe all reasonable rules relating to the naturalization of white men in this country. These are the most simple and common, as well as the most necessary, attributes of sovereignty, and so essential to the virtue and welfare of the Commonwealth that they ought not to be construed away from this Indian tribe, except upon the most positive and certain terms of the law.

If a white man, about to marry a Choctaw woman in good faith, intends to become a citizen of the nation, why should he object to conforming to the requirements of this statute, which in its demands are so simple, so just, and so easily performed? Is it because he is unable to make oath or to otherwise prove that he has not a living wife, or that he is unable to prove his good character, or that he is too poor to pay a license fee which is to procure for him a wife and purchase for him an undivided share in all of the lands of the Choctaw nation equal to that of any Choctaw in it? Or is it because he does not care to take the oath and make himself a Choctaw citizen that he may by the laws and customs of the Choctaw nation live on and enjoy their lands in the home of his Choctaw wife and children without submitting himself to their laws; that he may have all of the benefits of the usufruct of the Indian lands and United States citizenship combined?

When it is remembered that this law has been a public statute for twenty-two years past, and during all of that time the decision of every court having jurisdiction over this country has constantly and persistently been that the Choc-

law statute was valid and not in conflict with the treaty, and that the law in this jurisdiction for all of that time has been enforced by the courts upon that theory, the people, by public statute and by the judgment of the courts, having had full notice of the condition, it would seem strange, indeed, that any man, under these circumstances, whose purpose it was by this method to become an Indian, who intended to abandon his United States citizenship and become a Choctaw, would refuse to follow the statute and do those things, so simple and so plain, which the courts were proclaiming he must do. A marriage of a white man to a Choctaw Indian under these circumstances, without conforming to the requirements of the Choctaw statute, is the very strongest evidence of the fact that the man did not intend to become a Choctaw citizen, but that he did intend to retain that of his own country and race. As the laws were all along being administered, that was the effect of such a marriage. It will not do to say that the common people upon the subject of the law were wiser than the courts; that these men who were marrying Choctaw women knew all the time that the statute was void, and that the courts were in error, and they would marry in accordance with their own superior views, and wait until some wiser judge should take the bench and give a more proper exposition of the law. Of course, by these unlawful marriages they did not intend to become Choctaw citizens; their very object in marrying in this way was to avoid that very thing. I am not criticising them for marrying thus. The marriage was good, so far as the marriage relations between them and their wives and the legitimacy of their children were concerned, but it did not change their citizenship. They did not want it to make them Choctaws. This was the thing they were trying to avoid, and can it be said that without any intention to become a citizen, without any renunciation of his allegiance to his old sovereignty or any oath of fidelity to the new, and against his will at

the time it was solemnized, this marriage shall make him a Choctaw citizen?

Not only have the courts at Paris, Texas, and at Fort Smith, Arkansas, which, so far as the United States was concerned, for so long a time exercised exclusive jurisdiction over the Choctaw and Chickasaw nations, decided the law in accordance with this view, but the statutory law of the United States recognizes the validity of these Indian statutes relating to marriage. The act of May 2, 1890, extending and enlarging the jurisdiction of the United States court for the Indian Territory (Sup. Rev. Stat., vol. 1, p. 737, sec. 38), after granting to the clerk and deputy clerks of the said court the right to issue marriage license and certificates and to solemnize marriages in the Indian country, and extending the marriage laws of Arkansas over the said country, provides:

"That said chapter 103 of said Laws of Arkansas (the marriage law) shall not be construed so as to interfere with the operation of the laws governing marriage, enacted by any of the civilized tribes, nor to confer any authority upon any officer of said court to unite a citizen of the United States in marriage to a member of any of the civilized nations, until the preliminaries to such marriage shall have first been arranged according to the laws of the nation of which said Indian is a member:

*And provided further*, That when such marriage is required by law of an Indian nation to be of record, the certificate of such marriage shall be sent for record to the proper officer, as provided in such law enacted by the Indian nation."

Here is a direct recognition of the validity of the Choctaw statute by the United States through its laws enacted by Congress. Surely, the reason why the clerk of this court is not allowed by law to marry a white man to a Choctaw woman without it shall be in accordance with Choctaw law is because, in the judgment of Congress, it was necessary to the validity of the marriage, so far as to confer on the man

citizenship in the Choctaw nation. It is a statutory recognition of the sovereignty of these civilized nations, to the extent that they may control their own marriage and naturalization laws, as they should do.

In the case of *Nofire vs. United States* (116 U. S., 657) this question is inferentially, if not fairly, decided in favor of the validity of these Indian marriage statutes. The Cherokee statute is similar to the one under consideration. The case went up to the Supreme Court of the United States from the United States circuit court at Fort Smith, Arkansas. Judge Parker decided that because the party claimed to have been murdered by Nofire had not married his wife, a Cherokee Indian, in accordance with the Cherokee law, he was not a citizen of the Cherokee nation, he being a white man. Judge Parker had held that because the license to marry had been issued by a son of the clerk, who was not a deputy clerk, but was performing the duties of one, the license was issued without authority, and that therefore the marriage was void; but the supreme court differed with the judge of the circuit court, and held that the son of the clerk, acting as he did, as to those who dealt with him, was *de facto* clerk, and as to them his acts were valid, and therefore the man had been married in accordance with the Cherokee laws, which made him a Cherokee, and ousted the jurisdiction of the United States courts over him. While it is true that in that case the question was not directly raised before the court, yet the whole opinion concedes and the argument is made on the theory that marriage in accordance with the Indian statute was necessary to confer citizenship.

It is argued that if a white man marry an Indian woman in one of the States, in accordance with the law of that State, that it is a valid marriage there, and, by the well-known principle of the law that a marriage valid where contracted is valid everywhere, it must be valid in the Choctaw nation. The principle is conceded, but the effect of such a marriage in the State is only to create the relation of man and wife,

legitimatize the offspring, and give to him such control over the wife's property as the law of the State prescribes. Such rights he carries with him wherever he may go, because they are personal; they affect nobody but the man and his wife; he can carry them with him; they do not attempt to interfere with the political, civil, or property rights of others. But if the effect of such a marriage is to be given to it as is claimed here, it would decitizenize a citizen of the United States, making of him a citizen of a foreign country and a tenant in common with each and all of the people of that nation to every foot of land they own, and this, too, over the protest and against the laws of the foreign nation. No investigation into the character and fitness of the man to become a citizen is had, nor is any oath, binding him to his allegiance, administered. He may be the veriest vagabond that trod the earth, and can turn traitor to his adopted country without violating any promise of allegiance made by him. Surely such unusual and important incidents connected with the marriage, affecting as they do the political, civil, and property rights of others, cannot be said to be a part of such marriage. He carries with him into other countries only such marital rights as are conferred on him by the laws of the State where married and as are recognized by the civilized world as pertaining to the marital relation and such as affect only the parties to the marriage and their issue; and such rights, and such rights only, a white man who may marry a Choctaw woman in one of the States, in violation of the Choctaw laws, carries with him to the nation when he goes into it with his Indian wife; and such rights the Choctaws have always recognized; they allow the woman to retain her citizenship; the issue of the marriage is held to be legitimate, and the husband may live upon and cultivate their lands, by virtue of the title of his wife and children, and enjoy all of the marital rights to the full extent that they could have been enjoyed in the State where he was married as

elsewhere in the civilized world. The rule of the law that "a marriage valid where consummated is valid everywhere" is not violated by holding that the marriage of an Indian woman by a white man, in violation of the Indian laws, in one of the States does not confer upon him those rights of citizenship and of becoming vested to a title as tenant in common of the lands of the nation which a valid marriage, under the Choctaw laws, would confer.

The court is of the opinion, therefore, that in order to confer the right of citizenship by marriage in the Choctaw nation the marriage must be a valid one under the provisions of the Choctaw laws.

Hence in this case the claimant is not entitled to be enrolled as a citizen of that nation. The action of the Dawes commission in placing him on the said rolls is reversed, and the Choctaw nation may have judgment.

# V.

F. R. ROBINSON	}
vs.	
THE CHOCTAW NATION.	

The facts of this case are that the claimant, F. R. Robinson, is a white man; that on the 21st day of September, 1873, in the Choctaw nation and according to their laws, he married a Choctaw woman by blood, a recognized citizen of the Choctaw nation; that the said Indian wife died on the 21st day of April, 1884, and on August 10, 1884, claimant married a white woman, not a citizen of the Choctaw nation.

By the fifth section of the act of the Choctaw council approved November 9, 1875 (Durant Dig., 226), it is enacted:

"Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw nation by intermarriage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the

rights of citizenship; unless he or she shall marry a white man or woman or person as the case may be, having no rights of Choctaw citizenship by blood, in that case all his or her rights acquired under the provisions of this act shall cease."

The thirty-eighth article of the treaty of 1866 (14 Stat. at Large, —) provides:

"Article 38. Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

The question is, Do the Choctaw statute and the treaty conflict? If so, the statute must yield to the treaty, and the marriage is legal. If not, they both must stand, and the marriage, being in violation of the statute, is void.

At the hearing the question was argued that, the first marriage having been solemnized before the enactment of the statutes, the rights of the claimant became vested by that act, and therefore it was contended that, although the second marriage was after the statute became a law, it could not divest the claimant of those rights which had been conferred upon him before the passage of that act. But the view I take of the legality of this statute relieves me of the necessity of deciding this point.

The treaty makes every white man who may marry a Choctaw or Chickasaw woman a citizen, to use the language of the last words of article 38, above set out, "in all respects as though he was a native Choctaw or Chickasaw." By this provision of the treaty there is to be no difference between a citizen by virtue of his marriage and a native Choctaw. They are to enjoy equally and alike all of the benefits



of Choctaw citizenship, as well as share the burdens. Any act, therefore, of the Choctaw council passed after the ratification of the treaty which makes a distinction between them, granting to one greater privileges or rights or imposing on him more burdens than the other, or which shall undertake to enlarge or curtail the rights and privileges which flow from citizenship as to the one and not as to the other, would be in violation of this provision of the treaty, and therefore void. An act which puts the white man in any respect in a different attitude or condition than the Indian is void.

1 The Choctaw statute undertakes to deprive the white man who shall lose his Indian wife and afterward marry a white woman of all of the rights of citizenship. The marriage had vested a title to the lands in him. This is to be divested from him, and he is thereafter to be considered an intruder, subject to be removed from the country under the intercourse laws of the United States. This, too, notwithstanding the fact that his children, the issue of his Indian marriage, are Indians by blood and entitled to remain.

Now, unless a marriage of a native Indian to a white woman, after his Indian wife shall have died, has the same effect on him—that is, decitizenizes him, divests him of all title to the Choctaw lands, and deprives him of the right to live in the country—the statute works an inequality, and the white man does not enjoy the same privileges as the native Indian. The citizenship is different, and the rights flowing therefrom are not the same. The one may do an act that the other cannot do; the one has a privilege—that of marrying a white woman—that the other does not enjoy. The important right of unrestricted selection of a wife, enjoyed by the native Indian, is denied the white citizen by marriage, and therefore the provision of the statute, being in conflict with the treaty, is absolutely void, and it makes no difference whether the first marriage was before or after

the enactment of the statute. Of course, the latter marriage must be in accordance with the laws of the Choctaw nation.

I therefore find that the claimant is entitled to be enrolled. I hold also that the offspring of such a marriage would be entitled to be enrolled. The father being a lawful citizen, his children would follow his citizenship and by inheritance take any property rights he may have acquired thereby; but I do not think that the commissioners who negotiated the treaty ever contemplated that it should extend further and enable a white man whose Indian wife should have died to be in a condition that by his second marriage to a white woman he could, by virtue of such marriage, confer on his white wife citizenship so far that in case of his death she might remarry and confer on her white husband and her children by her second marriage the rights of Choctaw citizenship.

The action of the Dawes commission in enrolling the claimant is affirmed. Judgment for claimant.

## VI.

WM. N. TUCKER }  
                   *vs.*  
 CHOCTAW NATION. }

The facts of this case are that the claimant on the 16th day of February, 1893, at South McAlester, in the Choctaw nation, under a license of the clerk of the United States court for the Indian Territory, at that place, married a Choctaw woman; that in the solemnization of the said marriage he in nowise conformed with the provisions of the Choctaw statute relating to marriage between white persons and Indians. Afterward, learning that said marriage did not confer on him the right to become a citizen of the Choctaw nation, he remarried the same woman in accordance with the provisions of their laws.

The question is, under the circumstances, was the second marriage lawful, in so far as to confer on the claimant the right of Choctaw citizenship? The second section of the Choctaw statute relating to intermarriage (Durant Dig., 226) provides as follows :

“ Marriages contracted under the provisions of this act shall be solemnized as provided by the law of this nation, or otherwise null and void.”

Section 3 of the same act provides that—

“ No marriage between a citizen of the United States or any foreign nation and a female citizen of this nation, entered into within the limits of this nation, except as herein-after authorized and provided, shall be legal.”

Then follows a provision making it a misdemeanor and imposing a penalty upon all persons, their aiders and abettors, who shall violate the act.

Under the provisions of this statute there can be no question but that, so far as the Choctaw nation is concerned, the first marriage of the claimant was absolutely void—that is, it was as if it had never been solemnized, leaving the parties in the legal condition as if they had not been married at all. This being true as to them, how can they now say that the second marriage is void on the ground that the first was valid? Having declared by statute that the first was void, they are now estopped from contending that the second is void because the first was valid. As far as the Choctaw nation is concerned, and it is the only party to this suit who can be heard to object, the second marriage is valid because the first was void, giving the parties the right to remarry as if the first had not occurred. It cannot be said that there was anything fraudulent in the second marriage. It simply had the effect of naturalizing the party. It gave the Choctaw nation the opportunity of inquiring into his character, which was proven good. He paid the license fee and took

the oath. The whole object of the Choctaw law was accomplished in good faith, and the mistake made by him in the forms of his first marriage was corrected by the second.

As an evidence of the fact that this ruling is just since the appeal in this case was taken, it has been proven that the claimant has been duly and regularly enrolled by the Choctaw nation. The action of the said commission in enrolling the claimant is affirmed and judgment for claimant.

#### SUMMARY.

1. Absent Mississippi Choctaws are not entitled to enrollment.
2. All Mississippi Choctaws who may have removed into the Choctaw nation are entitled to enrollment without respect to the quantum of blood.
3. All absent Choctaws who have permanently moved away from the nation and have not returned are not entitled to enrollment.
4. All white persons married to Choctaws in accordance with their laws are entitled to be enrolled.
5. White persons married to Choctaws in violation of the Choctaw statute are not entitled to be enrolled.
6. White men who have married Choctaws in accordance with their statute, and the wife dies and the widower afterward marries a white woman, are, with the children by such marriage, entitled to enrollment; but do not, in case of their death, confer on the white wife citizenship to such an extent that she may confer it on a second white husband and the children by such marriage.

7. A white man having married a Choctaw woman not in accordance with the Choctaw laws, afterward marries her in accordance with such laws, is entitled to enrollment.

UNITED STATES OF AMERICA, }  
*Indian Territory, Central District.* }

I hereby certify that the above and foregoing are true copies of opinions handed down by me in the cases therein named and which cases were actually tried before me.

*Judge United States Court for the Central  
District of the Indian Territory.*

No. 453 vs.

FILED  
MAR 17 1899

JAMES H. BOKERHILL, Clerk.

*Wm. I. Cruce & Furman, Herbert, Cruce*  
IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Nos. 453 and others.

*Cruce & Thompson for Appell*

THE CHOCTAW NATION, APPELLANT,

vs.

F. R. ROBINSON ET AL., APPELLEES.

*Filed Mar. 17, 1899.*

Appeals from the United States Court in the Indian Territory.

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**BRIEF OF APPELLEES.**

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HENRY M. FURMAN,  
CALVIN L. HERBERT,  
WM. I. CRUCE,  
ANDREW C. CRUCE,  
JAMES C. THOMPSON,

*Counsel for Appellees.*





# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Nos. 453 and others.

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THE CHOCTAW NATION, APPELLANT,

vs.

F. R. ROBINSON ET AL., APPELLEES.

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Appeals from the United States Court in the Indian Territory.

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## BRIEF OF APPELLEES.

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### Statement.

The appellant, Choctaw nation, has had the records printed in above cause No. 453, and has filed brief therein. The contents of records in causes Nos. 582, Choctaw Nation vs. Martha Jones *et al.*; 583, Do. vs. Charles Goodall *et al.*; 584, Do. vs. Z. T. Bottoms *et al.*; 586, Do. vs. L. L. Blake *et al.*; 588, Do. vs. Robert Goins *et al.*; and 589, Do. vs. Henry Dutton *et al.*, are agreed to and agreement is on file, which agreement is hereafter designated as A. This brief is intended to apply only to said last named causes on behalf of the appellees therein. In 582, the record shows all the applicants are Choctaw Indians by blood, except a few therein mentioned as members of the tribe by intermarriage; and the court, upon the evidence and master's report, decreed that all those shown to be blooded Choctaws, and

those who had married into the family prior to the passage of the Choctaw marriage laws, and those who subsequently married into said family in compliance with said laws, were members of the tribe of Choctaw Indians, and as such were entitled to be enrolled. Most of the applicants in this cause were, and for many years had been, residents of the Chickasaw nation prior to the filing of application for enrollment, but a few of them were non-residents at the time. (A.)

*In cause No. 583*, the record is substantially the same. (A.)

*In cause No. 584*, the record is substantially the same. (A.)

*In cause No. 588*, the court, upon the master's report and the evidence, decreed that all the appellees except three are members of the tribe of Choctaw Indians by blood, and that three of them, having married into the family prior to the Choctaw marriage laws, were members of said tribe by intermarriage. Some of appellees were residents and others were non-residents of the Chickasaw and Choctaw nations, when application for enrollment was filed, and the court decreed that all the appellees, Choctaws by blood, and three others, members of the tribe by intermarriage, were entitled to enrollment. (A.)

*In cause No. 589*, the court, upon the evidence in the cause, held that all the applicants are members of the tribe of Choctaw Indians by blood, except Henry Dutton and J. G. Buck, which were held to be members thereof by intermarriage, and decreed they were entitled to be enrolled as members of said tribe. All the applicants are residents of the Chickasaw nation.

*In cause No. 586*, the applicant, L. L. Blake, in 1866, in the State of Texas, was married to Virginia Wall, a Choctaw woman by blood, and soon thereafter moved into the Indian Territory, where his wife died in June, 1867. August 12, 1869, said Blake married a Miss Thedia Crowder, a citizen of the United States and a resident of Arkansas, and

thereafter lived in the Indian Territory where he raised a family. Two of his daughters married white men, Graham and Coleman, in accordance with the laws of the Chickasaw nation. The court decreed that Blake and his second wife, their children, sons-in-law and grandchildren, are members of the tribe of Choctaw Indians and as such were entitled to be enrolled. All applicants for many years have been, and are yet, residents of the Chickasaw nation, and all are white persons. (A.)

In *cause No. 587*, all of the applicants were admitted as citizens of the Choctaw nation by blood, and as lineal descendants of Giles Thompson, a Choctaw by blood, except a few of the applicants, who were admitted as members of said tribe, by reason of their marriage into said family. Under the rules of the court, construing the Indian marriage laws, copied in the Roff record, all the applicants by marriage were admitted, and the proof shows all the other applicants beyond question are Choctaws by blood.

In all of the cases appealed to this Court from the U. S. Court in the Indian Territory, Southern District, wherever *the question of the applicants residence was involved*, that question *was made an issue and was passed upon by the master and the court*, but when no such defense was interposed by the nation, and no question of residence was raised, the master's reports and the final judgments of the court are *silent as to the question of residence*. To be more plainly stated, the master in his report, and the court in its final judgment, made no reference to the question of residence, where the evidence affirmatively showed that the applicants were residents of the nation to which they claimed citizenship. In all others the question was specially passed upon.

All the judgments in the foregoing causes were, by the court below, *rendered and made final prior to the 1st day of July, 1898*. And, although not disclosed by the record, it

is a fact the term of court at which said judgments were rendered had finally adjourned prior to July 1, 1898. The Indian appropriation bill, approved July 1, 1898, among other things, provided : "Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party *in all citizenship cases*, and in all cases between either of the Five Civilized Tribes and the United States involving the *constitutionality or validity* of any legislation *affecting citizenship* or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: Provided, that appeals in cases decided prior to this act must be *perfected in one hundred and twenty days from its passage* ; and in cases decided subsequent thereto, within *sixty days from final judgment* ; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or superseded by any proceeding in, or order of, any court, or of any judge, until after *final judgment* in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible." (U. S. Stat., 2nd session, 1897-1898, p. 591.)

Appellees contend that no appellate jurisdiction of said causes have attached to this Court, and therefore said causes should be dismissed from the Court's docket for the following reasons :

1st. Because the judgments appealed from were final and vested in the appellees the *vested and valuable right of Indian citizenship*, and as the act of Congress cited *supra*, was passed since the rendition of said judgments and is an attempt to confer upon this Court the power to reopen and retry said causes, said act is unconstitutional and void.

2nd. Because if said act confers upon this Court appellate

jurisdiction to pass upon said causes in any respect it gives to the Court the right only to enquire into, pass upon and determine the *constitutionality or validity* of the act of Congress of June 10, 1896, conferring upon the commission to the Five Civilized Tribes the right to pass upon and determine the citizenship of such tribes, and as such questions of law are not certified to this Court for its consideration, they cannot be considered by the Court.

3rd. Because the records herein were not filed with the clerk of this Court within one hundred and twenty days from July 1, 1898, and therefore the appeals herein were not perfected in accordance with said act of Congress.

In a recent opinion rendered by this honorable Court involving the question of citizenship, it was in effect held that the citizenship of a citizen of the United States is a vested right which cannot be impaired or divested by act of Congress or judicial decree. (U. S. vs. Wong Kim Ark.)

If that be the law, *a fortiori*, the citizenship of a Choctaw or Chickasaw Indian is beyond question a vested and valuable right, for the reason that such citizenship and the right of property are dependent the one upon the other and to destroy the one is a destruction of the other.

Prior to the act authorizing the Dawes Commission to make up a roll of citizens of the Five Tribes, the citizenship of such tribes was passed upon and determined by tribal courts, or committees, and from their decision appeals were taken to the Secretary of the Interior, whose decision, or that of the Attorney-General, seems to have been treated as final: In passing on the citizenship of a Cherokee citizen, whose right of citizenship had been passed upon by the chief justice of that tribe and decided in the applicant's favor, and wherein pursuant to an act of the Cherokee council a citizenship committee attempted to reopen and readjudicate the citizenship of such applicant, Attorney-

General Garland in an able opinion held the decision of the chief justice to be final and conclusive, and as Cherokee citizenship is a vested right the question could not be reopened and retried. (19 Opinion Attorney-General, 229.)

There being no fraud or mistake in the rendition of the judgments by the court below, in these cases, we submit the doctrine announced in the opinion of this Court in case of *Samperyac vs. U. S.* (7 Pet., 222), has no application herein.

But if this honorable Court should hold that the act in question is constitutional, then the query arises to what extent does the revisory jurisdiction of this Court go. Does it confer upon the Court the right to review the merits or evidence introduced in the court below, or does it extend only to the right of this Court to pass upon the *validity and constitutionality* of the act of June 10, 1896 (cited *supra*), conferring upon the Dawes Commission the right to make up a roll of citizens. If the language employed in the act, viz: "And in all cases between either of the Five Civilized Tribes and the United States," be eliminated from the act, or is followed by a comma, then the language of the act infallibly indicates that by such act Congress conferred upon this Court the right only to inquire into the *constitutionality or validity of legislation* affecting citizenship. But let the punctuation and the act remain as it is, then what does the act mean? But two classes of cases are mentioned, viz: (1) a case involving the constitutionality or validity of citizenship wherein the Indian nation and the applicant for citizenship are the only necessary parties, and (2) a case wherein the constitutionality or validity of legislation affecting the allotment of lands is involved wherein the United States is one and one of the tribes is the other necessary party. In the first case if either the nation or the applicant (the losing party) doubts the validity or constitutionality of the act of 1896, under

which a final judgment is rendered either granting or denying citizenship he or it may, by appeal, obtain the opinion of this Court upon such question.

Under the act of Congress, approved June 28, 1898, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," (U. S. Stat., 2nd Session 1897-1898, p. 495,) the allotment of the lands of the Five Civilized Tribes was provided for.

Section 11 of said act (*Id.*, p. 497) reads: "That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' shall proceed to *allot* the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same," etc.

The effect of this act of Congress was to coerce these tribes into an allotment of their lands in severalty without the assent of the tribes, unless the Choctaw and Chickasaw tribes should ratify the agreement theretofore entered into by the Dawes Commission and their commissioners which provided for allotment, Section 29, *Id.*, 505. So, therefore, on the 1st day of July, 1898, these five tribes were confronted by two conditions: 1st, to submit to the making of a complete roll of their citizenship by the Dawes Commission pursuant to act of Congress June 10, 1896; and 2nd, to submit to a coercive allotment of their lands pursuant to act of June 28, 1898 (*supra*), or to enter into agreements with said commission to allot the same. Under the first act by its express terms the judgment of the court granting or denying citizenship



was final, and the last act purported to allot lands through the Dawes Commission, and neither expressly or by implication recognized the right or power of the tribes to settle questions of citizenship or to allot their lands, but by these *acts of Congress* (this "*legislation*") the Dawes Commission, to the exclusion of the tribes, was given the right to pass upon and determine who were citizens or members of these tribes, and to allot their lands. The power or right of Congress to pass this *legislation* affecting the citizenship or the allotment of the lands of these tribes was questioned by the tribes, hence it is plain Congress, to settle the question of the *constitutionality or validity of its said acts affecting the citizenship of these Indians and the allotment of their lands*, attempted to refer the question to this Court for its consideration and final adjudication.

The records in these Choctaw cases were not filed with the clerk of the Court within 120 days from the passage of the act of July 1, 1898, and as the judgments in the court below were rendered prior thereto, we earnestly insist that none of the appeals herein have been "*perfected in 120 days*" from the passage of the act attempting to confer the right of appeal. (U. S. Stat., 1897-1898, 2nd Sess., 591.)

Paragraph 3, Rule 8 of this Court reads: "No case will be heard until a *complete record* containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, *shall be filed*." It is no answer to the contention to say a writ of error or appeal allowed by the *court* perfects the appeal, but we submit the rules of this Court show such appeal is not recognized (not perfected) until a complete record is filed with the clerk. For the reasons stated we seriously but earnestly insist that these cases should be dismissed from the docket of the Court.

## II.

Counsel for the nation in his brief presents to this Court the question, "Can the United States determine who shall be a citizen of the Choctaw nation, or is that a right that rests exclusively in that nation?" And states the "Choctaw nation contends that the United States has not the right to determine who shall be citizens of that nation, but that this is a right that vests in that nation exclusively as the sovereign."

Without rehearsing the history of the Choctaw tribe, we submit that this and the remainder of the Five Tribes, and all other tribes, of Indians in the United States, have at all times been under the direct supervision and control of the United States Government, and the history of Choctaw citizenship shows that appeals have been allowed from the Choctaw and Chickasaw citizenship, courts or committees, direct to the Secretary of the Interior, and the decision of the Secretary has been treated as final.

In the Indian appropriation act of June 7, 1897 (U. S. Stat., 1897, 1st Sess., p. 83), the Dawes Commission is directed "to examine and report to Congress whether the Mississippi Choctaws, under their treaties, are not entitled to all the rights of Choctaw citizenship *except an interest in the Choctaw annuities;*" and the jurisdiction of the tribal courts are taken from the Five Tribes and conferred upon the United States Court in the Indian Territory, and said United States Court is given original and exclusive jurisdiction to "try and determine all civil causes in *law and equity* \* \* \* and all *criminal causes* for the punishment of any offense committed after January 1, 1898, by any person in said territory \* \* \* and the laws of the United States and the State of Arkansas in force in the Indian Territory" is made to "apply to all persons therein, *irrespective of race,* \* \* \* and any citizen of any one of said tribes otherwise

qualified who can speak and understand the English language may serve as a juror in any of said courts." In the act of June 27, 1898 (commonly called the Curtis Bill, see p. 495, U. S. Stat., 2nd Sess., 1897-8), in section 2 it is provided: That in the progress "of any civil suit, in law or equity, pending in the United States Court in any district in the Indian Territory, if it shall "appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

Section 3 (same act, p. 496): "That said courts" (meaning U. S. Courts) "are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold *as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the Five Tribes, or the United States Court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons, or nation or tribe of Indians, entitled to the possession of the same.*"

Section 11 same act (497): "That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the '*Daves Commission*' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or

tribe susceptible of allotment among the citizens thereof, *as shown by said roll*, giving to each so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of the same," and providing that said commission after allotting said lands shall make full report thereof to the Secretary of the Interior for his approval."

Section 27 (same act, 504): "That on and after the passage of this act *the laws* of the various tribes or nations of of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Section 28: "That on the 1st day of July, 1898, *all tribal courts in Indian Territory shall be abolished.*" and conferring jurisdiction upon the United States Court in the Indian Territory to try and determine all civil and criminal cases pending in the tribal courts after dates in the act mentioned.

Section 29 (same act, p. 505): "That the agreement made by the commission to the Five Civilized Tribes with commissions representing the *Choctaw and Chickasaw tribes* of Indians on the 23d day of April, 1897, *as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the 1st day of December, 1898, by a majority of the whole number of votes cast by members of said tribes at an election held for that purpose; \* \* \** and if said agreement *as amended* be so ratified, the provisions of this act *shall then only apply to said tribes where the same do not conflict with the provisions of said agreement.*"

To the act of Congress last cited said amended agreement is subjoined. (Same act, pp. 505 to 513.)

It will not be denied but that the Choctaw and Chickasaw tribes by a majority vote adopted and ratified said amended agreement within a few months after the act of Congress of June 28, 1898 (cited), was passed. This agreement provides for a complete allotment of "all the lands

within the Indian Territory belonging to the Choctaw and Chickasaw Indians to the *members* of said tribes so as to *give to each member \* \* \** as far as possible a fair and equal share thereof." (*Id.*, 505.) It gives to each member the preferred right to select his allotment upon lands where his improvements are situated, which improvements are not to be valued or estimated. (*Id.*, 507.)

It expressly states, "That *all controversies arising between the members of the said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.*" (*Id.*, 507.)

"That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee." (*Id.*, 507.) This agreement provides, "that as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw nation and the governor of the Chickasaw nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land." (*Id.*, 507.)

"That the United States shall provide by law for proper records of land titles in the territory occupied by the Choctaw and Chickasaw tribes." (*Id.*, 508.)

This agreement provides for the laying out, mapping, and establishing town sites in the Choctaw and Chickasaw nations, and sale of town lots in said towns, the work to be done by an Indian commission to be appointed by the executive of each of said nations, and commission to be appointed by the President in each of said nations; the purchase money of such sales to be deposited in the Treasury of the United States; said moneys to be deposited for the ben-

efit of the members of the Choctaw and Chickasaw tribes. (*Id.*, 508-9.) All royalty upon mines is to be paid into the United States Treasury, and shall be drawn therefrom subject to the rules and regulations to be prescribed by the Secretary of the Interior. (*Id.*, 510.)

It confirms all leasehold interests "in any oil, coal rights, asphalt, or mineral *which have been assented to by act of Congress.* (*Id.*, 510.) It gives to the Secretary of the Interior the right to increase or diminish royalty on coal, etc. (*Id.*, 510), and the following stipulations are found therein: "It is further agreed that the *United States Courts* now existing, or that may hereafter be created, in the Indian Territory, *shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes \* \* \** and in all said civil suits said courts shall have full equity powers; and whenever it shall appear to said court, at any stage in the hearing of the case, that the tribe is in any way interested in the subject-matter in controversy, it shall have power to summon in said tribe and make the same a party to the suit and proceed therein in all respects as if such tribe were an original party thereto." (*Id.*, 511-12.) "It is further agreed, in view of the modification of *legislative authority and judicial jurisdiction* herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that *the same* shall continue for the period of eight years from the fourth day of March, 1898. This stipulation is made *in the belief that the tribal governments* so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in

*any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."* (*Id.*, 512.)

The commission to the Five Tribes (now known as the "Dawes Commission") was created by the Indian appropriation bill of March 3, 1893 (27 Stat., 645), and were authorized by said act to visit the Five Civilized Tribes and negotiate with them for the allotment of the lands in the Indian Territory between the members or citizens of such tribes. Acting under said appointment said commission visited said Five Tribes, and after repeated efforts to negotiate with them did on November 20, 1894, and on November 15, 1895, make reports to the Congress of the United States of their progress and of the condition of affairs existing in said tribes as to the manner in which lands were held by the members, and the manner in which the citizenship of said tribes was dealt with.

In their report of November 20, 1894, this commission reported to Congress the condition of affairs in the Indian Territory (see Miscellaneous Senate Document No. 24, 53d Congress, 3d Session).

And on November 15, 1895, said commission made another report to Congress, and among other things said :

"It can not be possible that in any portion of this country government, no matter what its origin, can remain peaceably for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the

Territory this attempt of a fraction to dictate terms to the whole has already reached its limit, and, if left without interference, will break up in revolution. The Chickasaw nation, in its zeal to confine within the narrowest limits and to the smallest number all privileges and rights, as well as participation in the government, and to weed out as many as possible of the uneasy, has enacted the following confiscation law :

“AN ACT to amend an act in relation to United States citizens procuring license to marry citizens of this nation.

“SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That an act in relation to United States citizens procuring license to marry citizens of the Chickasaw Nation be amended thus :

“SEC. 2. *Be it enacted*, That all United States citizens who have heretofore become citizens of the Chickasaw Nation or who may hereafter become such by intermarriage and be left a widow or widower by the decease of the Chickasaw wife or husband, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry another United States citizen, man or woman, as the case may be, having no right of Chickasaw citizenship by blood ; in that case all his or her rights as citizens shall cease and shall forfeit all rights of citizenship in this nation.

“SEC. 3. *Be it further enacted*, That whenever any citizen of this nation, whether by birth or adoption or intermarriage, shall become a citizen of any other nation or of the United States or any other Government, all his or her rights of citizenship of this nation shall cease, and he or she shall forfeit all the land or money belonging to the Chickasaw people.

“SEC. 4. *Be it further enacted*, That the rights and privileges herein conferred upon United States citizens by intermarriage with the Chickasaws shall not extend to the right of soil or interest in the vested funds belonging to the Chickasaws, neither the right to vote nor hold any office in this nation. All parts of acts coming in conflict with this act are hereby repealed, and that this act take effect from and after its passage.



" ' Approved, October 1, 1890.

" ' I hereby certify that the above is a true and correct copy of the original act now on file in my office.

" ' Given under my hand and seal this the 18th day of October, 1895.

" ' L. S. BURRIS,

" ' *National Secretary, Chickasaw Nation.*'

" It will be observed that among the other penalties here imposed the third section forbids on pain of confiscation any Indian citizen to apply under existing United States laws for United States citizenship, and thus gain a right to enter United States courts for vindication of his rights or avail himself of any anticipated authority conferred on that court to partition the common lands of the nation.

" The anticipated enforcement of this act has caused great consternation and excitement among a considerable number of residents in the Chickasaw nation who were, up to its enactment, admitted citizens, enjoying all the rights accorded to any citizen, and possessed, some of them, of very large property interests in the nation. Preparation is being made by the authorities of the nation for its enforcement, and notice to quit is being served upon those to whom it applies. In the meantime threats of open resistance are rife. The resolutions of a secret organization among those whose property is by this act confiscated have been laid before the Commission, in which the determination is avowed 'in the event that Indian officials undertake to carry out this law to exterminate every member of this council from the chief down.' The commission is appealed to for relief, but without power to interpose they can only bring this critical condition of affairs to the attention of the United States Government as one among the many reasons for immediate Congressional action.

#### " CHEROKEE CITIZENSHIP.

" Citizenship in these nations has been left by the National Government entirely under the control of the authorities in the several existing governments.

" The citizenship roll of the Cherokees has dealt with a larger number than any of the others, affecting as it does

all North Carolina Cherokees who desire to become a part of the nation, and a more liberal policy of adoption by intermarriage and otherwise than exists in the other tribes.

"A tribunal was established many years ago for determining the right of admission to this roll, and it was made up at that time by judicial decision in each case. Since that time and since the administration of public affairs has fallen into present hands, this roll has become a political football, and names have been stricken from it and added to it and restored to it, without notice or rehearing or power of review, to answer political or personal ends and with entire disregard of rights affected thereby. Many who have long enjoyed all the acknowledged rights of citizenship have, without warning, found themselves thus decitizenized and deprived both of political and property rights pertaining to such citizenship. This practice of striking names from the rolls has been used in criminal cases to oust courts of jurisdiction depending on that fact, and the same names have been afterwards restored to the roll when that fact would oust another court of jurisdiction of the same offense. Glaring instances of the entire miscarriage of prosecutions from this cause have come to the knowledge of the Commission and cases of the greatest hardship affecting private rights are of frequent occurrence. This practice is persisted in, in defiance of an expressed opinion of the Attorney-General of the United States forwarded to this nation on a case presented that it was not in their power to thus decitizenize one who has been made a citizen by this tribunal clothed by law with the authority. There is no remedy but an interference of the United States.

"The 'intruders' roll' is being manipulated in the same way. This 'intruders' roll' is the list of persons whose claim to citizenship is denied by the nation, and who by the agreement in the purchase of the 'Cherokee Strip' the United States are to remove from the Territory by the 1st of January next. This roll is now being prepared for that purpose by the Cherokee authorities, in a manner most surprising and shocking to every sense of justice, and in disregard of the plainest principles of law. The chief assumes to have authority to 'designate' the names to be put upon

the intruders' roll, and names are, by his order, without hearing or notice, transferred from the citizens' roll to that of intruders, so that, on January 1, 1896, the United States will be called upon to remove from the territory, by force if need be, thousands of residents substantially selected for that purpose by the chief of the nation. It has been made clear to the Commission that the grossest injustice and fraud characterize this roll. Persons whose names have been upon the citizens' roll by the judicial decree of the tribunal established by law for that purpose for many years, some of them for twenty or more, persons who have enjoyed all the rights of citizens, unquestioned by anyone until distribution per capita of the strip money, have been by the mere 'designation' of the chief stricken from the citizens' roll and put upon that of intruders, with notice to quit before January next. Children of such parents, born in the nation, now of age, with families and homes of their own, are receiving this notice to leave forever all they have earned and the homes they have built for themselves, and this at the will of the chief alone. If the United States Government removes such persons it will become a participant in this fraud and injustice, for which ignorance alone can form any excuse. The Commission feel it a duty to call attention to these facts, and invoke the direct intervention of the Government to prevent the consummation of this great wrong.

"These remarks apply specially to the Cherokee Nation, with which the United States has recently entered into obligations in respect to 'intruders.' But much of what is here said is applicable also to the condition of affairs in the other nations. In these nations many persons coming to the territory by invitation of the governments themselves, or under the provisions of the laws enacted by them, and acquiring citizenship, with homes and property, in conformity to such laws, have been in many instances stricken from the rolls of citizenship by those in power, for political and personal purposes, and laws enacted and other means resorted to to deprive them of the homes and property acquired.

"The Commission is of the opinion that if citizenship is

left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

(See Senate Document No. 12, 54th Congress, 1st session, pp. 14 to 17.)

Under the condition of affairs, as reported by this commission, we submit it was not only the right but the duty of Congress to confer upon it, as was afterwards done, the power to make a correct roll of the citizenship of each of the Five Civilized Tribes to the end that each member thereof would be protected in this his valuable right of citizenship. As the relation of the United States to these tribes is that of guardian to ward, when the Government was advised of the palpable frauds committed by those of political preferment among the tribes in the way of decitizenizing its own citizens, and thus forfeiting their interest in the joint estate, to our minds it was high time the guardian, through the agency of Congress, should have interposed its objection and arranged an adjustment of these gross wrongs, as it afterwards attempted to do.

### **Jurisdiction of Lower Courts.**

Counsel for appellee, Choctaw nation, orally argued that the United States Court in the Indian Territory, Southern District, had no jurisdiction upon appeal from the Dawes Commission to pass upon and finally decide the applications of Choctaws to be enrolled, because he insisted the Choctaw nation is situated in the Central and the Chickasaw nation the Southern District of the Indian Territory.

That portion of the act granting the right of appeal from the decision of the Dawes Commission in citizenship cases reads: "*Provided*, that if the tribe, or any person, be aggrieved

with the decision of the tribal authorities or the commission provided for in this act, *it or he* may appeal from such decision to *the United States District Court*: *Provided, however,* that the appeal shall be taken within sixty days, and *the judgment of the court shall be final.*" (U. S. Stat., 1st Sess., 54th Cong., 1895-6, p. 339.)

This act prescribed no rules of practice or procedure to govern either the commission or the "*United States District Court*" in the trial of these citizenship cases. At the date of its passage there was no *United States District Court* in this Territory, nor was there such a court in the States of Texas or Arkansas by that technical and literal name. The United States Court held at Fort Smith, Ark., is the "*United States District Court for the Western District of Arkansas,*" and the court held at Paris, Texas, is the "*United States District Court for the Eastern District of Texas,*" and the court in the Indian Territory is the "*United States Court in the Indian Territory.*" Now, what did Congress mean by the term, "the United States District Court"?

March 1, 1889, Congress by act then passed, entitled "An act to establish a United States Court in the Indian Territory, and other purposes." (25 Stat., 783.)

Section 1. "That a *United States court* is hereby established, whose jurisdiction shall extend over the *Indian Territory*" (defining boundaries), and providing for appointment by the President of a judge, marshal and attorney for said court.

Section 7 provides that *two terms* of said court shall be held each year at *Muskogee*, in said Territory, on *first Monday in April and September*, and such *special sessions* as may be necessary for the dispatch of business in said court at such times as the judge may deem expedient. (*Id.*, 784.)

May 2, 1890, Congress on that date passed an act entitled, "An act to provide a temporary government for the

territory of Oklahoma, to enlarge the jurisdiction of *the United States Court in the Indian Territory*, and for other purposes." (26 Stat., 81.)

Section 30 of which reads:

"That for the purpose of *holding terms of said court*, said Indian Territory is hereby *divided into three divisions*, to be known as the *first, second and third divisions*;" defining each of the said divisions; naming places in each division where court shall be held, and provides the "*judge of said court shall hold at least two terms of said court each year in each of the divisions* aforesaid, at such regular times as such judge shall fix and determine." (*Id.*, 94.)

March 18, 1895, Congress passed an act entitled "An act to provide for the appointment of additional judges of *the United States Court in the Indian Territory*." (28 Stat., 693.)

Section 1. \* \* \* "That the territory known as the Indian Territory, now within the jurisdiction of the United States Court in said territory, is hereby divided into three judicial districts, to be known as the Northern, Central and Southern Districts, and at least two terms of the United States Court in the Indian Territory shall be held each year at each place of holding court in each district at such regular times as the judge for each district shall fix and determine. The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency, and the townsite of the Miami Townsite Company. \* \* \* The Central District shall consist of all the Choctaw country. \* \* \* The Southern District shall consist of all the Chickasaw country." This act, also, provides for the appointment of two additional judges for said court, giving to each district a judge. In the Indian appropriation bill of June 7, 1897,

Congress made provision for the appointment of still another judge for this court, and this judge under the act is judge of none of the districts, but is required to hold court in any of the districts, at any place of holding court therein, to which the Court of Appeals of that territory may assign him. (U. S. Stat., 1st Sess., 55th Cong., 1897, p. 84.)

By the acts of Congress (cited above) it is seen that the court in this territory is designated as the "United States Court in the Indian Territory;" that this court consists of four judges, one for each district, and a *supernumerary* judge, any one of whom has the power or right to hold terms of court in any of the three districts in said territory.

It will not do to say that the *venue of the nation* (the territory embraced by it) entitled the nation, or requires the applicant for citizenship, to appeal to a United States court held in *that* nation. Because no provision has ever yet been made by Congress for holding a term of the United States Court in the Indian Territory in the *Seminole nation*—one of the nations of the Five Civilized Tribes. It will not do to say that Congress, by the appeal clause, intended to require the appellant to take his case to that branch of the said United States Court held where the *nation* resides. Because by said act of Congress the *residence* of the *nation* or *applicant* does not determine the jurisdiction of the court to which these appeals were taken.

The records, will show that all who applied to the commission to be enrolled as Choctaw citizens (except non-residents of the Indian Territory), and who appealed from the decision of the commission to the United States Court in the Indian Territory, *Southern District*, were *bona-fide* residents of the Chickasaw nation. The rules of practice established by the Dawes Commission (which were followed by us) required that all claiming the right to be enrolled as mem-

bers of the tribe and embraced in one family, *should be included in one application*. In many of these applications the residence of applicants necessarily was not the same. Some resided in the Chickasaw, some the Choctaw nation, whilst others resided without the limits of the Territory. In construing what Congress meant by the "*United States District Court*" we take it that the technical construction insisted on by counsel for appellant will hardly receive the serious consideration of the Court when the question is viewed in the light of the doctrine announced in—

*Ex parte Cooper*, 143 U. S., 239 ; Do., 138 U. S., 997 ;  
*Mackey vs. Cox*, 18 How., 299 ;  
*Boudinot vs. U. S.*, 78 U. S., 227.

#### **Classification of Choctaws and Chickasaws.**

- A. Citizens by intermarriage and by adoption.
- B. Citizens by blood (resident and non-resident).

We will first consider the citizens by intermarriage and adoption.

The latter portion of article 1 of the treaty of 1855, between the United States and the Choctaws and Chickasaws, reads :

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common ; *so that each and every member of either tribe shall have an equal, undivided interest in the whole : Provided, however, That no part thereof shall ever be sold without the consent of both tribes ; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same.*" (11 Stat., 612.)

Article 2 of the same treaty reads :

"A district for the Chickasaws is hereby established, bounded as follows, to wit : Beginning on the north bank of



Red river, at the mouth of Island bayou, where it empties into Red river, about twenty-six miles on a straight line, below the mouth of False Wachitta; thence running a northwesterly course along the main channel of said bayou, to the junction of the three prongs of said bayou, nearest the dividing ridge between Wachitta and Low Blue rivers, as laid down on Captain R. L. Hunter's map; thence northerly along the eastern prong of Island bayou to its source; thence due north to the Canadian river; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red river, and thence down Red river to the beginning: *Provided, however*, If the line running due north, from the eastern source of Island bayou, to the main Canadian, shall not include Allen's or Wapanacka academy, within the Chickasaw district, then an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district north, west and south from the lines of boundary." (11 Stat., 612.)

Article 4 of the same treaty reads:

"The government and laws now in operation and not incompatible with this instrument, shall be and remain in full force and effect within the limits of the Chickasaw district, until the Chickasaws shall *adopt a constitution and enact laws, superseding, abrogating, or changing the same*. And all judicial proceedings within said district, commenced prior to the adoption of a constitution and laws by the Chickasaws, shall be conducted and determined according to existing laws." (11 Stat., 612.)

Article 7 of the same treaty reads:

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over person and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or mem-

bers of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families—those peacefully traveling or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes.”

It will be seen that under the treaty of 1855 the Chickasaws were granted the right to establish and maintain a government of their own when they should, pursuant to such treaty, adopt a constitution and enact laws for that purpose, and, pursuant to such treaty, in the year 1856 the Chickasaws did adopt a constitution, section 11 of which reads:

“SECTION 11. The legislature shall have the power, by law, to admit, or adopt any person to citizenship in this nation, except a negro or descendant of a negro: *Provided, however,* That such an admission or adoption shall not give a right further than to settle and remain in the nation and to be subject to its laws.”

Pursuant to this treaty and this constitution thus adopted on the 17th day of October, 1856, the legislature of the Chickasaw nation, at its first term, passed an act as follows:

“AN ACT granting citizenship to the heirs of Wm. H. Bourland.

“SECTION 1. *Be it enacted by the legislature of the Chickasaw nation,* That the right of citizenship is hereby granted to the following-named children and nephews of Wm. H. Bourland: Nancy, Amanda, Matilda, Gordentia and Run Hannah. Approved October 17, 1856. C. Harris, governor.”

After the treaty of 1855 and the adoption of the Chickasaw constitution of 1856, and the passage of the act of October 17, 1856, adopting the Bourland heirs as citizens of the Chickasaw nation, the United States Government, on April 28, 1866, entered into a new treaty with the Choctaw and Chickasaw Indians, article 38 of which reads :

" Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw." (14 Stat., 779.)

Article 11 of the same treaty provides for surveying and dividing the lands of the Choctaws and Chickasaws in severalty ; the establishment of a land office. Article 12 provides for the mapping and surveying of the lands. Article 13 provides for notices to be published to those interested to the end that they may appear at the land office and examine such maps, etc., and articles 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, all pertain to the allotment of the Choctaw and Chickasaw lands and the granting to each member of the tribe his interest therein in severalty ; and article 26 of said treaty reads :

" The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such." (11 Stat., 777.)

Pursuant to the treaty of 1866, the Chickasaw nation, on August 16, 1867, adopted a constitution, section 7 of which under the head of " General Provisions," reads :

" All persons, other than Chickasaws, who have become citizens of this nation, by marriage or adoption, and have

been confirmed in all their rights as such by former conventions, and all such persons as aforesaid, who have become citizens by adoption by the legislature, or by intermarriage with the Chickasaws, since the adoption of the constitution of August 18, A. D. 1856, shall be entitled to all the rights, privileges and immunities of native-born citizens. All who may hereafter become citizens, either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor." (See page 15, Constitution, Laws, and Treaties of the Chickasaws, as published in 1878.)

Under the head of "Bill of Rights," in the same constitution, on page 5 of the same book, we find section 14, which reads:

"The legislature shall pass no retrospective law, or any law impairing the obligation of contracts."

On November 9, 1866, the legislature of the Chickasaw nation passed an act confirming the treaty of 1866 between the United States and the Choctaws and Chickasaws, section 1 of which reads:

"*Be it enacted by the legislature of the Chickasaw nation,* That whereas a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby give its consent to and confirm the said treaty and amendments made by the Senate of the United States."

On October 7, 1876, the legislature passed another act with reference to the Bourland heirs in language as follows:

"AN ACT granting citizenship to the heirs of William H. Bourland.

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation,* That the right of citizenship is hereby granted to the following-named children and nephews of William H.

Bourland : Amanda, Matilda, Gordentia, and Run Hannah. Approved Oct. 7th, 1876. B. F. Overton, governor." (Constitution, Laws, and Treaties of Chickasaws, page 76, as published in 1878.)

This act of October 7, 1876, is but a confirmation of the act of October 17, 1856, adopting the heirs of William H. Bourland as citizens of the Chickasaw nation. In effect, it is a declaratory statute.

Long after the treaty of 1866 and the adoption of the Chickasaw constitution pursuant thereto, in 1867, and the passage of the declaratory statute by the Chickasaw legislature in 1876, and on October 11, 1883, the legislature of the Chickasaw nation passed an act which reads :

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation*, That the right of citizenship granted to the following-named children and nephews of Wm. H. Bourland : Amanda Matilda, Gordentia and Run Hannah, approved October 7, 1876, the same is hereby repealed and annulled.

"SECTION 2. *Be it further enacted*, That the Governor is hereby directed and required to remove said parties and their descendants beyond the limits of this nation and that this act take effect from and after its passage."

In construing the last-named act of the Chickasaw legislature, this honorable Court in *Roff vs. Burney*, 168 U. S. (L. Ed.), 442, said :

"Now, according to this complaint, plaintiff was a citizen of the United States. Matilda Bourland was not a Chickasaw by blood, but one upon whom the right of Chickasaw citizenship had been conferred by act of the Chickasaw legislature.

"*The citizenship which the Chickasaw legislature could confer, it could withdraw.* The only restriction on the power of the Chickasaw nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution

or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. The Chickasaw legislature, by the second act, whose meaning is clear, though its phraseology may not be beyond criticism, not only repealed the prior act, but canceled the rights of citizenship granted thereby, and further directed the governor to remove the parties named therein and their descendants beyond the limits of the nation. This act was not one simply taking effect as of the date of its passage, and then withdrawing rights admitted to have been theretofore legally granted, but was retroactive in its scope, and purported to annul and destroy all that has ever been admitted to be done in respect to the matter. *Whether any rights of property could be taken away by such subsequent act need not be considered. It is enough to hold that all personal rights founded on the mere status thus created by the prior act fell when that status was destroyed."*

In this case property rights of Roff were not presented to and considered by this honorable Court in connection with his right of citizenship.

If it be true that the right of Chickasaw citizenship is a personal and not a valuable and vested right, then the language of this Court indicating that the Chickasaw legislature had the right to withdraw and abrogate Chickasaw citizenship is unquestionably true; but we must respectfully submit that under the treaty of 1866, articles 26 and 38, above referred to, and under the constitution of the Chickasaw nation of 1867, that he who acquired Chickasaw citizenship by legislative adoption or by intermarriage, not only became a member of the tribe of Chickasaw Indians, but became a tenant in common with the balance of the tribe in the lands of the Chickasaw Indians held in common with the Choctaw Indians and situated in the Choctaw and Chickasaw nations, and that to destroy the right of citizen-

ship is a destruction of the right to occupy and use the lands as a tenant in common with the balance of the tribe.

It is a destruction of his right to take his portion of the land in severalty when the lands are divided in accordance with the treaty of 1866, or the more recent treaty of the Choctaws and Chickasaws, entered into by their legislatures and confirmed by vote, cited above. We contend that the right of Chickasaw and Choctaw citizenship and the right of property, and the right to allotment are inseparable rights, and that the destruction of the right of citizenship absolutely destroys the right of property, a vested right; that the two rights cannot be separately treated, and we do not understand from the opinion of this Court in the Roff case that it was its intention to destroy any property right of Roff, acquired by virtue of his Chickasaw citizenship, but simply to destroy a personal right.

It will be seen that prior to the treaty of 1866, the status of an adopted Chickasaw or Choctaw Indian and one who acquired his citizenship by intermarriage with a member of the tribe, are entirely different to the status of a Chickasaw or Choctaw Indian since the treaty of 1866. The constitution of the Chickasaws of 1856, section 11 of which is quoted above, confers upon the adopted Chickasaw a right only to reside in the Chickasaw nation; but when the Government of the United States treated with the Chickasaws and Choctaws in 1866 they required of them an express stipulation, as contained in article 38 of said treaty, that the white person who has married into the tribe and resides in the Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities is to be deemed a member of said nation in all respects as though he was a native Choctaw or Chickasaw, and in article 26 of the same treaty it required these tribes of Indians by express stipulation to give to the intermarried

Chickasaw or Choctaw, or to the adopted Chickasaw or Choctaw, the same right of allotment as granted to the native Choctaw or Chickasaw, and we take it that the right thus granted to the intermarried or adopted citizen by the treaty is a valuable and vested right, and after it has once attached it cannot be divested by legislation or judicial decree. It is not simply a personal right to which there is no value attached, but it is a right upon which, or by virtue of which, the citizen acquires a vested right in property as a tenant in common with the balance of the tribe, and the vested right to take his portion of the land in severalty when such lands are divided among the members of his tribe, and on account of the treatment of the Indian tribes in refusing to recognize the treatatory and vested rights of the intermarried and adopted Indian, the Congress of the United States provided that the commissioners of the United States to the Five Civilized Tribes of Indians, known as the Dawes Commission, "is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be admitted and enrolled."

Under this act of Congress above quoted all *bona fide* members of the tribe of Chickasaw or Choctaw Indians, who acquired their membership or citizenship by legislative adoption or by intermarriage, had the right to apply to the Dawes Commission to have their names enrolled as members of the tribe to which they belong, and if the evidence showed that they were members of the tribe in accordance with the laws and treaties, then the commission should enroll their names as members of such tribe; if the application was denied, the applicants had the right under this law to appeal to the United States court in the Indian Territory and there present his application and evidence for the decision and adjudication of such court.



It is contended by counsel for appellant that the citizenship of A. B. Roff by virtue of the act of 1883, being but a personal right, was withdrawn by that act.

To our minds there can be no question but that the right of Chickasaw citizenship, under the treaties and under the constitution above quoted and the laws of the Chickasaw nation, is a vested and valuable right, and carries with it a property right, which is inseparable from the right of citizenship, and that the destruction of the right of Chickasaw or Choctaw citizenship *ipso facto* is a destruction of the right of property granted to the intermarried and adopted Chickasaw or Choctaw citizen by the terms of the treaty of 1866 and confirmed by the constitution of the Chickasaws of 1867; but if it be admitted that the right of citizenship thus acquired by Roff by intermarriage with Matilda Bourland can be withdrawn by the Chickasaw legislature, we would respectfully call this Court's attention to the Chickasaw constitution of 1867, cited above, which reads:

"The legislature shall pass no retrospective law, or any law, impairing the obligation of contracts."

The record in the Roff case shows his wife died long prior to act of 1893.

Then what did the Chickasaws mean by this section of the Constitution? Evidently it was intended that the legislature of the Chickasaw nation could not pass any retroactive law. In defining the word "retrospective" and "retroactive" it is said that retroactive or retrospective means affecting what is past; operating upon a past event or transaction. Retrospective is the more common. Any statute which takes away or impairs vested rights acquired under existing laws, or creates a new law imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed must be treated as retro-

spective. (Anderson's Dictionary of Law, page 897, and authorities cited.)

So it will be seen that not only was the act of 1883 of the Chickasaw legislature contrary to and in violation of the terms of the treaty of 1866, but it was directly in contravention with the Chickasaw constitution of 1867, and void for that reason. The treaties between the United States Government and the Choctaw and Chickasaw tribes must be treated as a statute of the United States, because none of them are effective until they are enacted into a law. It would, indeed, be a harsh and unjust decision to hold that the white man who came to the Chickasaw nation upon invitation of the Chickasaw Indians and pursuant to the treaty of 1866, and who married a member of the tribe in 1867, and acquired the right of citizenship by virtue of such marriage, and who has resided continuously in the Chickasaw nation since said dates and acquired property rights and varied interests as the result of his energy and enterprise, by an act of the Chickasaw legislature is to be deprived of his right of citizenship and his right of property thus acquired upon such right of citizenship, and that, too, without the consent of the United States Government, a party to the treaty, under the terms of which he was granted a right of Chickasaw citizenship which carried with it all the rights of a member of the tribe of Chickasaw Indians by blood.

We do not contend that the opinion of this Court in the Roff-Burney case can be construed to mean that Roff by reason of such act of the legislature is deprived of any right except a personal right; but for the reason that Roff in said cause alleged in general terms that his right of Chickasaw citizenship was acquired under the treaties made by the Chickasaws and Choctaws and under the constitution and laws of the Chickasaw nation, we take it that this honorable Court in said cause did not consider those portions

of the treaties and the constitution of the Chickasaws which showed plainly that Roff's right of Chickasaw citizenship and right of property are inseparable, and to withdraw and abrogate the one is an absolute destruction of the other. It may be, and as ~~far~~ **as** our researches have gone it is a fact, that this question of vested rights, as applied to the right of Chickasaw and Choctaw citizenship, was never before presented to this tribunal for its consideration and adjudication; but until recently questions of this kind under the law were settled by decisions rendered by the Attorney-General of the United States, at instance of Secretary of Interior and in a letter written by Attorney-General Garland and addressed to the Secretary of the Interior, dated January 23, 1889, a full discussion of the right of Cherokee citizenship is found, and in that letter the Attorney-General says:

"I find from the papers submitted no authority to supervise this act of the Chief Justice, and I certainly think there is none. The right of citizenship is determined in this proceeding and becomes an adjudicated matter, and to leave it an open question for review by the legislature, or the counsel or other authority, would be to unsettle every right of citizenship established under that act.

"In this, as in all other things, there must be a termination and ending somewhere. A proper construction of this act is that the judgment of the Chief Justice rendered according to the terms of such act is the final determination and serves nothing for review. *These principles of law would apply, if possible, with more force here than in ordinary cases, because it appears from the papers submitted that the Cherokee council invited the North Carolina Cherokees to come to the Cherokee nation and to become identified therein as citizens, and this plan of making them citizens was adopted to carry out the purpose of an invitation; and it therefore follows as a consequence, in reply to your second inquiry, that the Department of the Interior is under no laws to respect the decision of the Cherokee authorities in pursuance to the right of a*

commission established by the Cherokee legislature to inquire into the claims of citizenship of those persons *adjudged to be citizens as designated in the first-named inquiry. The right of citizenship cannot be forfeited by legislative act, directly and indirectly, no more than can be the right of property.*" (19 Opinions Attorney-General, page 233.)

On pages 45 to 59 of brief filed in case No. 496, Chickasaw Nation *vs.* Wiggs, the Hon. Halbert E. Paine, attorney for the Chickasaws, calls the attention of this Court to cause No. 469, Chickasaw Nation *vs.* A. B. Roff *et al.*, who were adjudged to be members of the tribe of Chickasaws by the court below. On page 46 of his brief he copies *ex parte* affidavit of Overton Love filed against Roff's application for citizenship, and states this affidavit shows the facts connected with the adoption of the Bourland heirs (to one of whom Roff was married years ago), but to this statement we must dissent.

September 7, 1896, A. B. Roff, for himself and two minor children (Walter and Mabel), and his two married daughters (Mrs. Clary and Mrs. Williams), and their husbands and children, and Leon, his adult son, filed application with Dawes Commission to be enrolled as members of the tribe of Chickasaw Indians, as follows (see printed Record, 3 to 5):

*Application of A. B. Roff and His Children and Grandchildren to Have Their Names Placed upon the Roll of Citizenship as Members of the Tribe of Chickasaw Indians.*

The undersigned petitioners, A. B. Roff, and Walter Roff and Mabel Roff, minors and children of A. B. Roff, by A. B. Roff as next friend, and Mrs. Matilda Clary and G. E. Clary and Leonard B. Clary and Emma Fay Clary, minors, by their mother and next friend, Matilda Clary, and Mrs. Alice Williams and her husband, George Williams, and Inez Williams, a child of Alice and George Williams, by her mother and next friend, Alice Williams, and Leon Roff,

represent and show to this honorable commission that they and each of them are members of the tribe of Chickasaw Indians, and that they and each of them are of right entitled to have their names enrolled on the roll of citizenship to be prepared by this honorable commission ; for these petitioners say :

First. That on the 17th day of October, 1856, the legislature of the Chickasaw nation passed the following act :

" An act granting citizenship to heirs of Wm. H. Bourland.

" SEC. 1. Be it enacted by the legislature of the Chickasaw nation, That the right of citizenship is hereby granted to the following-named children and nephews of William H. Bourland, Nancy, Amanda, Matilda, Gordentia, and Run Hannah.

C. HARRIS, *Governor.*"

Approved Oct. 17, 1856.

And these petitioners say that by reason of said act of said legislature that Matilda Bourland became and was a member of the tribe of Chickasaw Indians, as much so as if she had been a native-born citizen of the Chickasaw nation.

Second. That on the 24th day of January, 1867, the said Matilda Bourland was duly and legally married to the petitioner A. B. Roff, and that they lived together as husband and wife up to the time of the death of the said Matilda, and that by reason of the said marriage to said A. B. Roff, under the laws, treaties, and constitution, as they existed and as they now exist, petitioner A. B. Roff became and ever since has been a member of the tribe of Chickasaw Indians as much so as if a native-born citizen of the Chickasaw nation, with all the rights, privileges, and immunities of a native-born Chickasaw.

Third. That petitioner Matilda Clary is the legitimate daughter of A. B. Roff and Matilda Roff, and that Leonard Clary and Emma Fay Clary, minors, are the legitimate children of G. E. Clary and Matilda Clary.

Fourth. Petitioner further states that after the death of the said Matilda Roff that the said A. B. Roff was again legally married on the 11th day of November, 1869, to Hen-

rietta Davenport, and that he continued to live with his said wife up to the time of her death, and that during the time they lived together as husband and wife there was born unto them four children and petitioners herein, to wit : Alice Roff, now Mrs. Alice Williams ; Leon Roff, Walter Roff, and Mabel Roff.

Fifth. Petitioners state that the said Matilda Roff, the daughter of A. B. Roff, a petitioner herein, by virtue of a marriage license issued by W. H. Duncan, county and probate judge of Pickens county, Chickasaw nation, was on the 12th day of February, 1890, duly and legally married to the petitioner G. E. Clary, and that by reason thereof the said G. E. Clary became and was and ever since has been a member of the tribe of Chickasaw Indians, and that since their marriage there was born unto them two children, namely, Leonard B. Clary and Emma Fay Clary, minors and petitioners herein.

Sixth. The petitioners further state that the said Alice Roff, the daughter of A. B. Roff and Henrietta Roff, on the — day of —, 1895, was duly and legally married to George Williams and that the said Williams by reason thereof became and was and ever since said date has been a member of the tribe of Chickasaw Indians, and that since their marriage there was born unto them a child, namely, Inez Williams, a petitioner herein.

Seventh. Petitioners further show that an act of the legislature of the Chickasaw nation passed October 17th, 1856, adopting said Matilda Bourland and others, as aforesaid, has been ratified and confirmed by a vote of the Chickasaw Indians, and that for a long time after the marriage of the said A. B. Roff and Matilda Bourland, and until a few years ago, said A. B. Roff was recognized and treated as a member of the tribe of Chickasaw Indians by said tribe of Indians.

In support of the foregoing statements the petitioners herewith file affidavits, record evidences, copies of law, &c., and further show by indorsement hereon that the principal chief or governor of the Chickasaw nation has been duly and legally served with a true copy of this application and with a true copy of the evidence herewith filed.

Wherefore, the premises considered, these petitioners pray

that their names be duly enrolled upon the roll of citizenship to be prepared by this honorable commission as members of the tribe of Chickasaw Indians, and will ever pray.

FURMAN & HERBERT,

*Attorneys for Petitioners.*

The answer filed by the Chickasaw Nation does not attempt to controvert the facts alleged in this application (Record No. 459, pp. 5 to 11), but sets up as a defense, 1st, That the Chickasaw act of 1856 adopting the Bourland heirs (one of whom Roff married), was repealed by act of that nation passed in 1857; 2nd, That the Chickasaw constitution of 1855 only authorized the legislature, by legislative adoption, to confer upon the Bourland heirs the right to *reside* in the Chickasaw Nation, and that said act adopting them was unconstitutional. This answer is lengthy but a careful reading of same will show we correctly state the issues.

The master, upon the whole evidence, held that the act of 1856 adopting the Bourland heirs was not repealed by the *alleged* act of 1857; that Matilda Bourland was an adopted Chickasaw; that her marriage to A. B. Roff (with whom she resided in the nation up to the time of her death) under the treaty of 1866 and constitution of 1867 (cited *supra*) made Roff a member of the tribe with all the rights, privileges and immunities of a *native* or *blooded* Chickasaw; that his children by his first and second wives are members of the tribe, and that the husband of his daughter, Matilda Clary, having married according to tribal laws, is a member of the tribe; that the husband of his daughter, Alice Williams, is not a member, because his marriage did not conform to the tribal laws; that the children of his married daughters are members of the tribe (*Id.*, Rec., pp. 13 to 17). This man Roff *has resided in the Chickasaw nation* since his first marriage, January 24, 1867 (Rec., p. 3).

The court, upon the *evidence* and master's report, decreed that all applicants (ten in number) except George Williams are members of the tribe of Chickasaw Indians, and are entitled to be enrolled as such (Rec., p. 23).

We submit that if articles 38 and 26 of the treaty of United States with Choctaws and Chickasaws mean anything, it decides in favor of appellees in the Roff case the question of citizenship.

Even if the Chickasaw nation in 1857 had the right to repeal the act of 1856 and decitizenize the Bourland heirs, the evidence does not show such act was then repealed. As late as 1876 a committee of the Chickasaw nation, in codifying the laws of this tribe, reported to the legislature as a then existing statute the act of 1856 adopting the Bourland heirs (Rec., p. 14).

For years this man, Roff, was treated by this tribe as a member thereof in every sense. January 11, 1882, Judge B. W. Carter (Indian), judge of the District Court of the Chickasaw nation, passed upon his status as a citizen of said nation and held him to be a citizen thereof. (Rec., p. 41.) In 1888, the United States Indian agent at Muskogee, Ind. Ter., was applied to to remove him as an intruder, but application was denied. (Rec., pp. 41-2.) In 1880 he was accepted as bondsman in the tribal courts. (Rec., p. 43.) In 1889 he was summoned to serve as a juror in the Indian District Court of said nation (Rec., p. 44), and as late as March 19, 1896, the nation granted to him and other members of the tribe a mining charter. (Rec., p. 42.) A prominent Choctaw lawyer in 1897, in discussing the rights of an intermarried Choctaw, said to the United States Court that this class of people have but *one* right *under the treaties* and that is "a right to be whipped!" And it does appear to us that the Chickasaw nation is trying to apply that rule to Roff and insist upon it as the law. But as was shown



by the report of the Dawes Commission to Congress (quoted herein) this is a fair way to state the disposition of these tribes to fritter away the citizenship of its white members and thus confiscate their fortunes acquired as the result of thirty years hard work. No restrictive marriage laws existed in the Chickasaw Nation at the time Roff was married to Matilda Bourland, nor at the time he married the second time—hence, it must be held, his marriages were in conformity with article 38 of the treaty of 1866.

After the ratification of the treaty of 1866, the Choctaw nation in 1875 passed a marriage law (Opinions of Judge Clayton, p. 29) providing that every *white man*, or citizen of the United States, or of any foreign government, desiring to marry a *Choctaw woman*, citizen of the Choctaw nation," shall obtain a license as in said act provided by paying *one hundred dollars* for a marriage license. This statute does not require a female white person to procure or obtain such license to marry a male member of the Choctaw nation. So, even if this statute is valid (which we deny), article 38 of treaty of 1866 is complied with, and the requirements of such Indian statute are conformed to when a female citizen of the United States legally marries a male member of the Choctaw nation, no matter under what law such marriage is consummated.

The marriage law of the Chickasaw nation of October 19, 1876, is as follows :

"SECTION 1. Be it enacted by the legislature of the Chickasaw nation, That all non-citizens shall remain in any one county of this nation for a period of two years, and be of good moral character and industrious habits, before they can procure a license to marry a citizen of this nation ; Provided, further, they be recommended by at least five good and responsible citizens of this nation, and of the county wherein they resided, the county judge being satisfied with the petition shall grant a license to marry under existing

laws, and the non-citizens so applying for license shall pay fifty dollars, five of which shall be retained by the county judge and forty-five dollars to be placed in the national treasury for national purposes.

"SEC. 2. Be it further enacted, That such member of the Chickasaw nation shall be competent to contract marriage, or shall have the consent of his or her parents or guardian to marry such citizen of the United States, *and hereafter no marriage between a citizen of the United States and a member of the Chickasaw nation shall confer any right of citizenship, or any right to improve or select lands within the Chickasaw nation, unless such marriage shall have been solemnized in accordance with the laws of the Chickasaw nation :* and all marriages between citizens of the United States and members of the Chickasaw nation shall be duly certified by the officer or minister of the gospel who shall have performed the marriage ceremony, to the clerk of the county court of the county where such marriage took place, who shall record the same, and every such officer or minister of of the gospel (if a citizen of the Chickasaw nation) who shall marry a citizen of the United States to a member of the Chickasaw nation without such license, shall be subject to a fine of fifty dollars, to be imposed by the county court and collected as other fines, for county purposes; and if such minister be a citizen of the United States, he shall be removed from the nation.

"SEC. 3. Be it further enacted, *That no marriage heretofore solemnized, or which may hereafter be solemnized, between a citizen of the United States and a member of the Chickasaw nation, shall enable such citizen of the United States to confer any right or privilege, whatever, in this nation, by again marrying a citizen of the United States, or upon such other citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation, and shall have heretofore abandoned her, or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all right acquired by such marriage in this nation, and shall be liable to removal, as an intruder, from the limits thereof.*

"SEC. 4. Be it further enacted, That all acts or parts of

acts coming in conflict with the provisions of this act are hereby repealed, and that this act take effect from and after its passage."

This marriage law should not be sustained, because it is in conflict with the treaty. It is not uniform in its application. It discriminates against the white member of the tribe in favor of the blooded member. Article 38 of the treaty of 1866 places the white member on the same plane as the blooded Indian and gives to him all the rights, privileges, and immunities of an Indian by blood. This law treats the marriage of a *blooded Chickasaw to a white person* as a civil contract. It gives to him the right to divorce himself from his wife and to marry as many white women as he desires and can get, and thereby confer Chickasaw citizenship upon each of his said wives and the issue of all of said marriages. The white member of the tribe, if his Indian wife dies, or if he abandons her for adultery, forsooth, cannot treat the marriage relation as a civil contract; but if he would not become an *intruder—an exile*—if he desires to marry again he *must confine his marriage contracts* to the dusky maiden, wherein one drop of Indian blood "the surging sea outweighs!"

Will it be assumed that this great Government must look to these tribes of Indians to determine what is meant by the marriage relation? Is the language employed in article 38 of the treaty of 1866 ambiguous and susceptible of more than one construction? Not so, although counsel for appellant in his oral argument attempted to show that the language "having married" does not mean "who is married," but means *who had theretofore married into the tribe* and, therefore, he insisted that marriages, subsequent to this treaty, conferred no right upon the white person, and that, too, in the face of article 26 of the same treaty which amounts to a flat contradiction of his theory.

Mr. Blackstone said :

" Our law considers marriage in no other light than as a *civil contract*. The *holiness* of the matrimonial state is left entirely to the *ecclesiastical law*. And such contract is good and valid if the parties, (1) were at the time of making it *willing to contract*, (2) *able to contract*, and (3) *actually did contract in the proper forms and solemnities required by law*."

1 Black, Com. 439.

Stewart's Marriage and Divorce, Ch. 11.

14 Am. and Eng. Ency. Law (old ed.), 470.

No better definition of a marriage can be given than is given by Mr. Blackstone. Suppose, in lieu of these laws, the tribes had said a "white person by marrying a member of the tribe shall not become a member of the tribe," or by saying "he shall not be entitled to an allotment of the lands," or that "he shall marry according to the rules of the common law—the statutory laws of Texas, Kansas, or Arkansas"—could such rule be sustained in the light of the treaty? Suppose we look to the treaty above to determine the status of the white man who has married a member of the tribe, would not a marriage contract consummated under the rules of common law, or under any statute, valid where consummated, be sustained as a valid marriage in this Territory? We submit, if the parties are competent to contract marriage, and they legally consummate such marriage contract under the forms of law, the marriage is valid the world over, even though the male spouse had not been previously *recommended* to his affianced in particular and the nation in general as to "good morals," financial standing, &c. Bad morals might be, and doubtless is, a ground for divorce; but do they inhibit the consummation of a marriage contract?

Not only does appellant contend that the white person must continuously marry a Chickasaw or Choctaw by blood

to perpetuate his nationality (as a member of the tribe), but that if he marries a white person even in accordance with the tribal laws he, *ipso facto*, decitizenizes himself. Judges Townsend and Clayton *stretched* the doctrine far enough to hold that the local marriage laws of these tribes must be complied with or citizenship by marriage could not be acquired, but held that a white person acquiring citizenship by marriage became a member of the tribe for all purposes and could confer such citizenship by again marrying in compliance with the tribal marriage laws. (Clayton, Opinions 38 and 41, and Townsend's Opinion, Roff Case No. 469, docket this Court, p. 18.)

#### **B. Citizens by Blood (Residents and Non-Residents).**

The right of the Chickasaw or Choctaw who resided in either nation of said tribes when he applied to the Dawes Commission for enrollment regardless of the *quantum* of Indian blood is not disputed, but as Judge Clayton held an absentee did, and Judge Townsend held he did not, expatriate himself by reason of his absence the right of the non-resident is presented to this Court for its decision. Article 14 of the treaty of 1830 between the Choctaws and the United States reads (7 Stat., p. 333):

"Article 14. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half of that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years

after the ratification of this treaty, in that case a grant in fee-simple shall issue ; said reservation shall include the present improvements of the head of the family or a portion of it. *Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."*

After the treaty of 1855 (cited *supra*) between the Choctaws and Chickasaws and the United States, and under the terms of which the Chickasaws, by purchase, acquired an undivided one-fourth interest in and to the Choctaw nation, and the right to carve out and establish the *now* Chickasaw nation, the treaty of 1866 between these tribes and the United States was entered into (14 Stat., 774), article 13 of which provides for surveying, sectionizing, and mapping the lands of these tribes.

Article 12 reads :

"The maps of said surveys shall exhibit, as far as practicable, the outlines of the *actual occupancy* of members of the said nations, respectively ; and when they are completed shall be returned to the said land office at Boggy Depot for inspection by *all parties interested*, when notice for ninety days shall be given of such return in such manner as the legislative authorities of the said nations, respectively, shall prescribe, or, in the event of said authorities failing to give such notice in a reasonable time, in such manner as the register of said land office shall prescribe, calling upon all parties interested to examine said maps—to the end that errors, if any, in the location of such occupancies, may be corrected."

Article 13 of same treaty reads :

"Article 13. The notice required in the above article shall be given, *not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the States of Mississippi and Tennessee, Louisiana, Texas, Arkansas and Alabama, to the end that such Choctaws and Chickasaws as yet remain out-*

*side of the Choctaw and Chickasaw nations may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws. Provided, That before any such absent Choctaw or Chickasaw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become bona fide resident in the said nation within five years from the time of selection. And should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land shall thereafter be discharged from all claim on account thereof."*

On November 5, 1886, the Choctaw council passed an act (Clayton Opinions, pp. 22 and 23) as follows :

*" AN ACT entitled An act defining the quantity of blood necessary for citizenship."*

*" SEC. 1. Be it enacted by the General Council of the Choctaw nation assembled, That hereafter all persons, non-citizens of the Choctaw nation, making or presenting to the general council, petitions for rights of Choctaws in this nation, shall be required to have one-eighth Choctaw blood, and shall be required to prove the same by competent testimony.*

*" SEC. 2. Be it enacted, That all applicants for rights in this nation shall prove their mixture of blood to be white and Indian.*

*" SEC. 3. Be it further enacted, That no person convicted of any felony or high crime shall be admitted to the rights of citizenship within this nation.*

*" SEC. 4. Be it further enacted, That this act shall not be construed to affect persons within the limits of the Choctaw nation, now enjoying the rights of citizenship.*

*" SEC. 5. Be it further enacted, That this act shall take effect and be in force from and after its passage."*

On December 24, 1889, the general council of the Choctaw nation passed the following resolution :

"Whereas, there are large numbers of Choctaws yet in the States of Mississippi and Louisiana, who are entitled to all the rights and privileges of citizenship in the Choctaw nation ; and,

"Whereas, they are denied all rights of citizenship in said States ; and,

"Whereas, they are too poor to immigrate themselves into the Choctaw nation : Therefore,

"*Be it resolved by the general council of the Choctaw nation assembled*, That the United States Government is hereby requested to make provisions for the emigration of said Choctaws from said States to the Choctaw nation," etc.

(Clayton's Opinions, p. 14.)

In the light of the foregoing treaties and laws we respectfully but earnestly insist that Choctaw and Chickasaw citizenship is divided into three classes, viz :

1st. The citizen by blood, resident or non-resident, and that the *quantum* of blood is immaterial.

2d. Citizens who have legally married members of the tribe, and

3d. Citizens by legislative adoption ; and that, once a member of either of these tribes the citizen is always a member unless he decitizenizes himself pursuant to act of Congress.

Elk *vs.* Wilkins, 112 U. S., 94.

Raymond *vs.* Raymond, 28 C. C. A., 38.

The courts below gave much attention and time to the investigation of these cases, and their conclusions of fact, we submit, will not be inquired into by this honorable Court and that



all the cases herein referred to should either be dismissed for want of jurisdiction, or affirmed upon the lower court's findings of fact.

HENRY M. FURMAN,  
CALVIN L. HERBERT,  
WM. I. CRUCE,  
ANDREW C. CRUCE,  
JAMES C. THOMPSON,

*Counsel for Appellees Named.*

**IN THE  
Supreme Court of the United States.**

**OCTOBER TERM, 1898.**

**NO. 453.**

**THE CHOCTAW NATION vs. F. R. ROBINSON.**

**BRIEF AND ARGUMENT OF APPELLEE.**

Statement contained in brief of Appellant is correct, containing the facts upon which this case is seeking adjudication.

In the year 1866 there was a treaty entered into between the Choctaw and Chickasaw nations and the United States which, in part, provides:

“Article 38. Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw.”

As to the constitutionality of the act of congress authorizing the Dawes commission. It cannot be contested that the treaty, at the time of its adoption, was unconstitutional. It contravened

no rights of either of the parties to its stipulations. It was agreed upon and adopted by the parties thereto, and signed by them. It immediately became a law between the parties, and a law which was not sought to be abrogated or annulled until after the elapse of a number of years, to-wit, from its adoption until this appeal was taken by the appellant. Now, was the, and is the, appellee a citizen of the Choctaw nation under the provisions of that treaty, Article 38? Had no further treaties been entered into by the United States and the said nations; had no more or other laws than were at that time extant in the Choctaw nation been made, and if the Choctaw nation was now governed solely by those laws which then governed it, would the appellee be entitled to citizenship in said nation? Beyond a question. Appellee is a white man, he married a Choctaw woman, having procured a license to so marry from the proper Choctaw authority, and having married in accordance with the Choctaw laws, record, pages 1 and 2. He had always been recognized as a citizen of said nation, by intermarriage, and was "regularly "enrolled on the revised rolls of the Choctaw nation as a citizen "by intermarriage of said Choctaw nation," record, page 7; having been at one time appointed as an election judge of one of the elections of said nation—record, page 2.

Appellee was, then, at one time a citizen of said nation, and admittedly so. The United States had the authority at any and all times to enforce the provisions of the said treaty by securing to all claimants under its provisions their rights and privileges.

No party to a contract can be denied the privilege of having its contractual provisions enforced. And a contract entered into between two parties, if, of course, legal, can not be controlled or altered or revised at the option of either party. There must be mutual assent. And if one party should essay to change the stipulations of the contract, the other party can refuse to recognize, or be controlled by the changes and compel the other to

live up to, and abide by, the original contract. If, then, as in this case, the Choctaw nation presumes to enact in its legislative branch of government, years after the adoption of the treaty of 1866, a law that seeks to disfranchise citizens, as is the case in the enactment approved November 9th, 1875—Durant Dig., 226—the United States certainly has the constitutional right to reject said enactment, and demand that the nation abide by the treaty stipulations, and has the constitutional and moral right to compel the nation to abide by said treaty provisions.

There was an act of the Choctaw council approved November 9th, 1875—Durant Dig., 226—being the same act above referred to which reads:

“Should any man or woman, a citizen of the United States, “or of any foreign country, become a citizen of the Choctaw “nation by intermarriage as herein provided, and be left a “widow or widower, he or she shall continue to enjoy the rights “of citizenship; unless he or she shall marry a white man or “woman or person, as the case may be, having no rights of “Choctaw citizenship by blood, in that case all his or her rights “acquired under the provisions of this act shall cease.”

The only question, then, for this court to consider, we submit, is, Which is to prevail, the treaty of 1866, article 38, or the act passed by the Choctaw council, approved November 9th, 1875?

If the act of the Choctaw council is to be the guiding aid to a decision, then it must be admitted that appellee should not be permitted the rights and privileges of citizenship. But, contra, if the treaty is to direct. If, we submit, the statute and the treaty conflict, the treaty must take precedence and the statute fall. And it is too palpable to admit of contention that the two do conflict, and on the most salient point; for it is the evident intention of the statutory enactment to abrogate and annul the treaty stipulation as to citizenship. The Choctaw council

can readily be pictured perusing the treaty, then turning each member to the other with heads slowly shaking in the negative saying: "No. We must pass a law that will supersede that treaty, because by that treaty we cannot take away from a citizen his citizenship rights." And for that purpose, we submit, and that purpose alone, the act became a law of the Choctaw nation.

But can such a law prevail? The appellee has been awarded his citizenship rights; he has been enrolled as a citizen by the laws of the Choctaw nation; he has held himself amenable to the Choctaw nation; his citizenship was granted him in pursuance of the treaty of 1866; he has always been regarded and treated by the Choctaw nation as one of its intermarried citizens, and can that nation, after admitting him to citizenship, without cause, without reason, without justice, exile him from the benefits and immunities and rights of that citizenship? Can the nation, merely because appellee chooses for his wife another than whom the nation would dictate as his choice, take from him, in a great measure at least, what he has, what his labor and industry have gained him in material interests? Must he be compelled, after having given up all else to become one of their number, be told that the time has come when he must return all that he was given, with interest, and seek elsewhere for recognition? His first marriage was consummated according to the laws of said nation, and before, by years, the enactment of the statute referred to, and even though his second marriage was contracted after the statute had been approved, had not his rights as a citizen become so vested as to preclude his being divested of them by an act of the Choctaw council?

The treaty, beyond a question, makes no distinction between a citizen by marriage and a citizen by birth and blood. The former are to enjoy equally with his native brother the benefits of

citizenship, as well as to bear its burdens. Would not, therefore, any act of the Choctaw council passed after the ratification of the treaty which draws a distinction between the two, granting to one more benefits than it confers upon the other, or imposing more and greater burdens upon one than upon the other, be in conflict with the treaty, and, consequently, void and of no effect?

Can an Indian who marries a white woman be removed from the Choctaw nation under the intercourse laws between said nation and the United States? Of course not. But the nation seeks to remove the white citizen under the same conditions; the nation permits the Indian citizen to marry a white woman and still retain his title to land, his citizenship rights and benefits and privileges, and yet attempts to compel by law a white citizen, one made a citizen under the treaty of 1866, to release all his holdings and depart from the nation limits. In other words, the Choctaw nation says: "You are both citizens, of course; but "you will have to abide by one of the laws that have been lately "passed, which says, that the one of you shall remain a citizen "but the other shall become an alien." The one citizen can marry a white woman; the other can not. Does not this contention seem little short of the ludicrous?

The appellee was admitted as a citizen of the Choctaw nation, and has never sought to ally himself to or with any other nation; the act being in conflict with the treaty, is absolutely void, and the appellee should remain upon the Choctaw rolls as an intermarried citizen.

Respectfully submitted,

WILLIAM RITCHIE and  
RITCHIE & DURANT,

ATTORNEYS FOR APPELLEE.

IN THE  
***SUPREME COURT OF THE***  
UNITED STATES.

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**OCTOBER TERM 1898.**

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**N<sup>o</sup>. 461.**

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JENNIE JOHNSON, ET AL. - - - *Appellants.*

*V'S.*

THE CREEK NATION, - - - *Appellee.*

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*Appeal from the United States Court for the Northern  
District of the Indian Territory.*

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**BRIEF FOR APPELLANTS**

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This is an appeal by Jennie Johnson and her children, Clarence Johnson Mary F. Johnson, Jennie B. Johnson, and Walter A. Johnson; James M. Barber and his children, Sarah E. Barber, Birdie E. Barber, John S. Barber, Pearl I. Barber, Niles Barber and Mary M. Barber.

Benjamin A. Barber and his children, Mariah E. Barber, Eva A. Barber, Ida B. Barber, Edward H. Barber, Sarah E. Barber and Dora D. Barber;  
Martha S. Coker and her children, Silas G. Coker, James M. Coker, Robert T. Coker, Eva Coker, Maud F. Coker and Alva L. Coker;

Benjamin B. Posey;

Mary Lula Posey;

Nina G. Posey and her child, Fred Posey;

George W. Posey and his children, Katy Posey, Annie Posey and Claud Posey;

William Posey;

Mollie F. Stocton and her children, Roy M. Stocton, Harry T. Stocton and Grover C. Stocton;

R. F. Barber;

R. W. Barber;

H. J. Barber and his child, Jessie L. Barber and L. E. Barber.

from the Judgement and decree of the United States Court for the Northern District of the Indian Territory at Muskogee.

Under the provisions of the Act of Congress approved June 10th 1896, authorizing the Commission of the United States to the five Civilized tribes, to hear and determine applications for citizenship therein, these appellants applied in due time to said Commission to be enrolled as citizens of the Creek Nation, their application



being denied they duly, according to law, appealed to the United States court for the Northern District of the Indian Territory, and on the 16th, day of June 1898, that court by its decree refusing them admission to enrollment as citizenship of the Creek Nation, they appealed to this court.

These appellants allege that they are all Creek Indians by blood and residents of the Creek Nation, and that is the basis of their claim to citizenship.

The Act of Congress of June 10th, 1896 authorizing the commission to the five Civalized tribes to make a roll of the citizens of each tribe, provides as follows: "That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said Nations and after such hearing they shall determine the right of such applicant to be admitted and enrolled." The purpose of this enrollment was, of course, but preliminary to the allotment of the lands of these Indian tribes in severaltia mong the individual members of said tribes. This will not be denied in the light of the current history of the time and the well defined and pronounced policy of the Government in reference to the Government and lands of these Nations, then and now being urged.

Under the treaty made by the Government with the Creek people on the 14th. day of February 1833, and

in accordance with the terms of that treaty, the United States, by the President Millard Fillmore, on the 11th, day of August 1852, by patent, conveyed the lands in the Creek Nation to the Creek tribe of INDIANS, that is to the tribe of INDIANS of the CREEK BLOOD.

The third article of the treaty of the 14th, day of February 1833, which is quoted in the Patent of the Government and with the Fourth Article is the authority for the Patent, is as follows: "The United States will grant a patent in fee simple to the Creek Nation for the land assigned said Nation by this Treaty or Convention whenever the same shall have been ratified by the President and senate of the United States, and the right thus granted by the United States, shall be continued to said tribe of INDIANS so long as they shall exist as a Nation and continue to occupy the country hereby assigned them".

Article 4th.: "It is hereby mutually understood and agreed between the parties to this treaty that the land assigned to the Muskogee Indians by the 2nd. Article thereof, shall be taken and considered as the property of the whole Muskogee or Creek Nation, as well as those now residing upon the land as of the great body of said Nation who still remain on the east side of the Mississippi.

"Now, Know Ye, that the United States of America, in consideration of the premises, and in conformity with above recited provisions of the treaty

aforesaid have given and granted, and by these presents do give and grant unto the said Muskogee or Creek tribe of *Indians* the tract of country above described. To have and to hold the same unto the said tribe of *Indians* so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them.

By this grant, each Indian of the Creek blood had vested in him an interest in this land, to be continued to said tribe of INDIANS that is to be continued to the INDIANS of that tribe as long as they shall exist as a Nation and continue to occupy this country.

Congress under its power of control over these Indians, having entered upon the policy of changing this vested ownership in common to an ownership in severalty among all the Indians of the tribe, found it necessary to make an enumeration or enrollment of those entitled, under this patent, to take in severalty under the proposed new order of things, that is an enrollment of the Creek Indians by blood, who under the grant held the vested interest in the land.

The enrollment then which the act of Congress requires to be made of Creek Indians by blood, who could lawfully take in severalty a share of this estate. This is a case where blood must tell because the conveyance is to the people of the blood, so the prime and controlling enquiry in making this enrollment is and must be as to the blood of the party applying to be en-

rolled. This, the learned Judge, who tried this case, we respectfully submit, overlooked.

The citizenship which Congress provided might be applied for to the Commission was then more in the nature of membership by blood or status of blood of the Creek tribe than technical citizenship, and that should have been the paramount enquiry by Commission and Court.

That enquiry can have but one answer in fact and by the testimony taken in this case. Appellants are all Creek Indians by blood, as is universally admitted in their country and virtually conceded by the trial Court by resorting to what is known as the Alien Act of the Creek Nation, an act by which they attempted to disinherit, by law, certain Creek Indians who left the country and remained away for over twenty-one years, and by arguing that though they had been on the roll of Creek citizens they had been stricken from that roll by the notorious committee of eighteen whose conduct as shown by the testimony in this case was so fraudulent as to be unworthy of any Judicial consideration, and of whose conduct Mr. N. A. Gibson, Special Master in Chancery in this cause, says: "That the proof taken by me in regard to the action and proceedings of this committee of eighteen, discloses a condition of affairs that is startling on account of the corruption and folly indicated by the actions of the various members of the

committee. It appears that the sessions of the committee were held informally and that any visitor was at liberty to come in and if he heard a name called that did not please him he was at liberty to get up and say that he objected to that man and the name was forthwith stricken off." I printed Record page No. 25.

But the great question now to be considered in reference to these appellants is the question of Creek blood or no Creek blood. Mr. R. P. DeGraffenried, Special Master in Chancery, to whom this case was referred for inquiry as to the blood and Creek rights of these appellants has found and reported that they are all Creek Indians by blood. Printed Record Pages No. 9 to 17.

Again Mr. N. A. Gibson, another special master in chancery, to whom this case was referred for inquiry as to blood and citizenship of the parties, finds and reports that they are all Creek Indians by blood, and residents of the Creek Nation. Printed Record Pages No. 22 to 27.

Appellants are the grand children and great grand children of Benjamin Posey and his wife, Eliza Posey, nee Berryhill, both shown to be Creek Indians of the half blood and nephew and niece of John Berryhill, (Benjamin Posey and his wife being cousins.)

The testimony of Nathaniel Berryhill, Creek Indian by blood, found on page 43 of the printed record,

is referred to as showing the blood of Benjamin Posey, the ancestor of these families. He says, "was well acquainted with Benjamin Posey for fifty years in the State of Georgia, Alabama and Texas; that he left Alabama in 1846; that Benjamin Posey was a son of Nancy Posey, who was a daughter of John Berryhill, who was half blood Creek or Muskogee Indian. That the following named persons were the uncles and aunts of the said Benjamin Posey :

John D. Berryhill, Alexander Berryhill, Katie Self, nee Berryhill, Susan Self, nee Berryhill and Betsy Berryhill, all of whom were emigrants from Georgia to the Creek Nation about the year 1832. That the aforementioned persons are the sons and daughters of John Berryhill, who was a Creek Indian by blood and descent. That Eliza Posey, wife of Benjamin Posey, was a half blood Creek Indian."

The testimony of Silas H. Barber, John M. Posey, M. A. Posey, Mrs. E. H. Allen, John C. Barber, Robert T. Barber, Lucinda A. Smith, Shelton Smith, Mary E. Vance, Hugh R. Johnson, Joseph Mingo, G. A. Posey, R. S. Barber, Benjamin Posey, and L. C. Perryman, Principal Chief, found on the printed record from pages 44 to 64, bears directly upon the point of the blood of these appellants, and verifies the findings of Special Masters, DeGraffenreid and Gibson, and shows beyond the possibility of doubt that they are all Creek Indians

by blood and residents of the Creek Nation and sustain the first, second, third and fourth assignments of error made by appellants, and in fairness and law settles the case in their favor and ought to have ended the inquiry.

The testimony of George Tiger, Napoleon B. Childers, Joseph Mingo, Ellis Childers, Louis McGilbra, Moses Smith, James M. Barber, Upter Bird, Warrior Rentie, Gabriel Jamison, Louis McHenery, Tackie Grayson, N. O. Perry, Mrs. Eliza Allen found on printed record pages 65 to 82, corroborates and confirms the statement of the witnesses first named as to the blood of these appellants.

On page 82 of the printed record is found a copy of the decision and judgment of N. B. Childers, Judge of the Coweta District, Muskogee Nation in these words: "After questioning the witnesses in Barber's and Posey's case, I, N. B. Childers, Judge of Coweta District, rule and so decide that the claimants heretofore mentioned were citizens of the Muskogee or Creek Nation and entitled to enrollment. Witness my hand this the 13th day of June, 1893."

(Signed)

"N. B. CHILDERS,

Judge of Coweta District."

Attention is also called to the appointment by Upter Bird, Prosecuting Attorney of Coweta District, of James M. Barber, one of these appellants as, assistant Prose-

cuting Attorney, which office can only be held by an Indian by blood.

These parties have all the same ancestors, belong to the same family, and are of the same status as to blood and citizenship.

Mrs. Jennie Johnson, Benjamin A. Barber, James M. Barber, Mrs. Martha S. Coker, Mrs. Nina Posey, George W. Posey, Mrs. Mollie F. Stockton and H. J. Barber are the heads of families, the other appellants being their children and near relatives, all of whom stand in the same relation as to Creek blood, so that what is said in the testimony as to one of them applies to all.

Silas H. Barber, in his testimony, record page 47, says: "That on December 6, 1846, he married Sarah A. Posey, who is a daughter of Benjamin and Eliza Posey, who were recognized Indians by blood and descent, that Eliza Posey's name before marriage was Eliza Berryhill."

The following named persons are the sons and daughters of the said Silas H. Barber and Sarah A. Barber, nee Posey :

Robert T. Barber, born December 26, 1848, Benjamin A. Barber, born August 25, 1845 ; James M. Barber, born January 17, 1852 ; John C. Barber, born March 20, 1853 ; Martha S. Barber, born December 21, 1857 ; Mary A. Barber, born January 21, 1867.



He further states: "That the foregoing named sons and daughters of his are Creek Indians by blood and descent, that Benjamin Posey and Eliza Posey were the grandfather and grandmother of his said children and were recognized Creek Indians by blood and descent."

John M. Posey states: "That he is an acknowledged citizen of the Creek Nation and James M. Barber is a son of his fathers sister, making him a first cousin of the deponent, and that his father is an acknowledged citizen of the Creek Nation, and that the said Barber is a citizen of the Creek Nation and should be so acknowledged". Record 47.

M. A. Posey testifying as to the blood of B. A. and J. M. Barber and M. S. Coker, says: "That he is a member of the Creek Nation Indian Territory, that he is a first cousin to John C., Robert T., B. A. and J. M. Barber. and M. S. Coker by blood, that his father Bill Posey was a full brother by blood to their own mother Sarah Ann Barber, he further swears, "that all of said Barbers above named are one fourth Creek Indians." Record 49.

Mrs. E. H. Allen, a member of the Creek Nation, Indian Territory, says: "She is a member of the Creek Nation, that she is a sister of Sarah Ann Barber, the mother of John C. Barber, Robert T., B. A. and J. M. Barber, and M. S. Coker." Affiant further swears:

"That their mother and her own sister by blood was a one-half Creek Indian by blood." Record 49.

John C. Barber and Robert T. Barber, both depose and say : "That they are members of the Creek Nation of Indians; that they are part Indian by blood and are now recognized citizens of the said Nation and are enjoying all the rights and privileges appertaining to such Indians; they each further swear that they are full brothers of J. M. Barber, B. A. Barber and M. S. Barber, who is now the wife of M. L. Coker, having the same father and mother, they each and all five have one-fourth Indian blood in them, they further swear, that J. M. Barber has now living six children, to-wit : Bettie, Bertie, John, Pearl, Niles and Pink; that B. A. Barber has now living seven children, to-wit : Harrison, Mira E., Eva A., Ida B., Edward H., Sarah A. and Dorah D.; that M. S. Coker, their sister, had now living six children, to-wit : Silas, Marquis, Robert, Eva, Maud and Lena; they each further swear that M. S. Coker, their sister, did prove up her rights of such Indian blood and did draw her pay in the year 1891 in the Oklahoma money, amounting to \$29.00."

James M. Barber, being first duly sworn, says : "My name is J. M. Barber ; my age is forty-five ; I live in the Creek Nation, two and one-half miles from Wagoner ; my grandfathers name was Benjamin Posey ; my grandmothers name was Eliza Berryhill ; they were

both half breed Creek Indians. When I knew them first they lived in Texas, but they moved to this country years ago, about 1882. My mothers name was Sarah E. Posey. My father was a white man, his name was Silas H. Barber ; Tom Barber and John Barber are my full brothers ; I am between the two; I am a full brother of the two. They are the John C. Barber and the Robert T. Barber, whose names appear on page 178 of Perryman's Digest of the Creek Laws, approved October 30, 1889, also on Page 103 of McKillops Digest of 1893. \* \* \* \* I was born in Texas ; my grandparents are dead; my grandfather died in the Creek Nation and is buried on Billie Brown's place in the Creek Nation about eight miles from Choska. The other appellants in the Jennie Johnson case are all children, grandchildren and great grandchildren of Benjamin Posey. Bill Posey was my full uncle. He was killed in the Creek Nation by the authority of the Creek Nation. He was known and recognized by every one in this country as a Creek citizen and was never disputed. I came to the Creek Nation, Indian Territory, in 1872 ; I afterward left the Indian Territory and went back to Texas. I intended to come back. I have always, all my life claimed this as my home. My people have always claimed this as our home, and some of us have come back here every year. They came back and were recognized as citizens of the

Nation. I last came back here in September, 1890, and have resided here continuously ever since, and have all my possessions here.

I have made right smart improvements in the Creek Nation, I have farms, pastures, cattle and hogs; I was called before Judge Childers of Coweta District, Creek Nation, by a notice which is hereby presented and a copy filed herewith marked exhibit "B." The "light horseman" who served this on me told me that they wanted me to appear before the court and show why I was living here, that there was some dispute about it; that they wanted me to bring up all my connections. We were living in a lawful pasture and we were claimed to be non-citizens, and they wanted us to go there and prove we were citizens, I notified my connections living around me, George W. Posey, known as Ely Posey, Mollie Stockton and my young half brothers, Coker's wife whom I represented (Mary S. Coker) and some other young ones. All of us appeared before the court on the day mentioned in the summons. Court set and called the trial. Joseph Mingo, being my town king, represented the case before the court. He satisfied the court that we were citizens. The judge told us to go home and attend to our own business, that we were all right. We held our improvements and have till to-day. The pasture that I was in was leased to John Gibson, and he refused to pay for the part I held. Afterwards

the part I was on was cut out of the pasture and my place was surveyed out of the pasture. By the authority of the Nation the surveyor who was employed to survey the pasture was ordered to leave out the place of citizens in the large pastures and my place was left out when the pastures were surveyed. Afterwards I began to fence a mile square, north of my place, for my pasture, and made a trade with the man who had the pasture leased, by which he paid me for that mile square. Joseph Mingo has always claimed me as a member of his town and a citizen of the Nation, and has always appeared and defended me when my rights were questioned. I have voted in the Creek Nation ever since 1889 in the principal elections, that is in the elections of the chief. I have voted in my town as a town member all the time till last year. The last election we have had that was the election called to consider the treaty with the Dawes Commission. We all voted in that election. I have acted as a deputy light horse—as a militia man. I was called on by Judge N. B. Childers to assist the light-horse and did so serve. I have guarded prisoners and acted in that capacity until the court discharged me. In the Chepon Flannery case I was requested by the judge to summon ten men. I summoned W. T. Morgan and other men, some of my relations, Ben Posey and G. W. Posey. I have held the position of assistant to the District Attorney,

Upter Bird, since January, 1897, under authority from him as shown by attached authority filed herewith and marked exhibit "C." A copy is filed by the Special Master.

"Before I put in my place, I went to see Chief Perryman and showed him my papers and told him who I was. He told me that he recognized me as a citizen and that I was as much a citizen as he was, and that the law did not bar me from putting in the place; that I was alright and that I should pick me out a place and go to work; this was all before I made the proof of citizenship before Judge Childers. I was struck off the roll of the Creek Nation by the Committee of Eighteen in 1895. I was never summoned to appear and was never given an opportunity to appear and make my proof before that Commission. I afterwards made application to the Commission of Five and gave bond for costs and stayed there six weeks trying to get a trial. They would not give me a trial and adjourned without giving me a trial. I then went before the Dawes Commission and made the application, which is now here in this court on appeal."

Such is the testimony showing the Creek blood of John C. Barber, Benjamin A. Barber, James M. Barber and Martha S. Coker, for they are all full brothers and sisters, and John C. Barber and Robert T. Barber are full brothers to each of them, John C. Barber, born

March 20, 1853; James M. Barber, born January 17, 1852; Robert T. Barber, born December 26, 1848; Benjamin A. Barber and James M. Barber, born of the same mother and begotten by the same father between Robert T. and John C. Barber, and yet Robert and John are recognized as Indians by the Dawes Commission and Benjamin and James M. are refused recognition.

Mrs. S. M. Coker is a full sister to them all, and she too is refused recognition by the Dawes Commission.

It is difficult to see how Robert Barber and John C. Barber, born of Sarah A. and Silas H. Barber can be Creek Indians by blood and Benjamin A. and James M. Barber and Martha S. Coker born of the same parents can be white people and citizens of the United States, without any Indian blood. A fair consideration of this fact is enough to convince the court that great injustice has been done, not to the Nation, because there is no doubt or denial that Robert T. Barber and John C. Barber are Creek Indians by blood, and the wrong and injustice is done to their brothers and sister who are denied their birth and blood rights.

#### MARY LULU POSEY.

Her Creek blood is shown by the testimony of John C. Barber and Robert T. Barber, page 56 printed record, and by the testimony of Mrs. E. H. Allen, page 57, and by the testimony of M. A. Posey, page 58.

by all of whom it is shown that she is of one-fourth Creek blood.

GEORGE W. POSEY.

He is shown to be one-fourth Creek Indian by blood by the testimony of Mrs. E. H. Allen and M. A. Posey, page 53 of the printed record, by the testimony of John C. Barber and Robert T. Barber, page 54 Mary E. Vance, page 55.

WILLIAM POSEY

Is one-fourth Creek blood as shown by the testimony of M. A. Posey, page 53; John C. Barber and Robert T. Barber, page 54; Mary E. Vance, page 55.

MOLLIE F. STOCKTON.

That she is one-fourth Creek Indian by blood is shown by Mrs. E. H. Allen, page 58; M. A. Posey, John C. and Robert T. Barber, page 59; Silas H. Barber, page 60.

R. F. BARBER AND R. W. BARBER AND  
H. J. BARBER AND L. E. BARBER

Are shown to be a one-fourth Creek Indians by blood by the testimony of Mrs. E. H. Allen, page 62; M. A. Posey, page 63; John C., Robert T. Barber, page 63; Silas H. Barber, page 64; Joseph Mingo, page 64.



### MRS. JENNIE JOHNSON.

She is known to be a one-fourth Creek Indian by blood by the testimony of Mary E. Vance and Hugh R. Johnson, page 55; L. C. Perryman, Joseph Mingo, page 56 and by the testimony of J. M. Allen, E. H. Allen, Thomas Barber and John Barber, page 61.

### NINA POSEY AND BENJAMIN POSEY

Are each shown by the special masters in chancery to be one-fourth Creek Indians by blood, the testimony upon this point of Creek blood and residence seems to be overwhelming in favor of these appellants, and we do not think that a court can be found that upon the testimony in this case would deny that they are Creek Indians by blood and reside in the Creek Nation. There is not a syllable of testimony nor an intimation upon the part of any witness in this whole record denying their Creek blood or residence in the Creek Nation.

Upon another proposition this application ought to be decided in favor of these appellants. The act of Congress of June 10, 1896, directing the Dawes Commission to hear and determine applications for citizenship in the various tribes has this proviso: "And provided further that the rolls of citizenship of the several tribes as now existing are hereby confirmed." Page 339, Acts of Congress, 1895-'96.

If therefore these appellants were then properly and legally upon the existing rolls of the Creek Nation, they were confirmed by this Act of Congress as citizens of the Creek Nation.

It is contended that the Committee of "Eighteen," under the Act of the Creek Council, approved May 17, 1895, struck the names of these appellants from the Rolls of Creek Citizens, and in the opinion of the Judge of the Trial Court printed in this Record at page 41, the case of Roff vs. Burney, 168 U. S., 223, is cited as an authority for the Legislative Council of the Creek Nation, by itself or by its Committee of "Eighteen" to de-citizenize these appellants; but the law as laid down in that case is an authority, we maintain, against the right of the Creek Council or its committee by legislation to deprive appellants of their citizenship. In that case, Plaintiff Roff and his wife, Matilda Bourland were citizens of the Chickasaw Nation, not by blood but under an act of the Legislative Council, and we think the clear intimation from the opinion of the court in that case is that no property right could be taken away by such legislation. Certainly the opinion in Roff vs. Burney in no way supports the position of the learned Judge who tried the case upon the proposition for which it is cited.

We maintain in reference to the Creek rolls that these appellants were, up to May, 1895, upon the regu-

lar rolls of Creek citizens, and that the effort of the committee of "Eighteen," under the Act of the Creek Council of May 17, 1895, was fruitless in that they had no legal power and that the Creek Council could confer on them no legal authority to effectually drop appellants from the Creek rolls, that they therefore, in legal contemplation, remained upon the roll confirmed by Act of Congress, June 10, 1896. Further we insist that these appellants, being Creek Indians by blood as shown, and residents of the Creek Nation had such a vested interest in the lands of the Creek Nation, under the Patent from the Government above referred to as that they could not be divested there of by any legislative enactment. and still further we contend that the act of the Creek council did not give or purport to give to the Committee of "Eighteen" the power to act finally, but that its action was to be submitted to the Council which would then require legislative action on the part of the Council to confirm their finding and which was never had, and which we insist would have been powerless to disinherit these Creeks by blood if attempted.

We therefore turn our attention, first to the testimony, to ascertain whether appellants were upon the Creek roll.

James M. Barber, at page 45 of the printed record, says: "After having given the names of his children. the above named children were upon the census roll of

the Creek Nation until the year 1895, at which time the names of myself and children were stricken from the roll."

Mrs. E. H. Allen, in her testimony says: "That the said above named J. M. Coker, B. A. Barber, and their sister, M. S. Coker, were proven citizens of the Creek Nation and were placed upon the census rolls of said Nation and are entitled to all the privileges and rights of said Nation of Indians, as all other members of said Nation."

John C. Barber and Robert T. Barber, after naming their brothers J. M. Barber, B. A. Barber, and M. S. Barber, and their sister, M. S. Barber, says: "That each of their brothers and sisters above described and named did prove their rights and were placed upon the census roll of the Creek Nation, and were entitled each to have enjoyed all rights and privileges thereunder as citizens until the year 1895, when the authorities of said Nation, by their appointed Committee, did place them upon the doubtful list of members of said Nation. Record page 50.

On page 57 of the record, after speaking of Ben and Lulu Posey and others as their cousins, John C. and Robert Barber, say: "Their cousins above named did make application to prove their rights and were placed on the Census Roll of the Creek Nation, etc."

Further on page 59 of the record, after speaking

of their cousin, Mollie F. Stockton, John and Robert Barber state : "That their cousin above named did prove her right and was placed on the Census Roll of the Creek Nation and was entitled to enjoy all the rights and privileges of a citizen until the year 1895, when the authorities of said Nation, under their Committee, placed her on the doubtful list."

On page 68 of the record Joseph Mingo, Town King of Broken Arrow Town, says : "Afterwards the Council passed an act repealing the act which required the District Judges to pass upon these citizenship cases, then an act was passed by the Council requiring each Town King to make a correct roll of his own town. At that time I was elected Town King of Broken Arrow Town, and I noticed this act authorizing each Town King to make a correct roll of his town. In making the roll I found that Jim Barber's mother was a full sister to Mrs. Allen. \* \* \* \* If Mrs. Allen was a citizen, her sister was also a citizen, and that it was satisfactory to them all that I should pass upon these peoples rights in order to get a correct roll of the town, and therefore I enrolled them in my town. At the time I was enrolling them Mary Stockton came up and though her maiden name was a little different they proved that she was of the same family and so I enrolled her. I had the roll made up as correctly as I could with these names on it and it was submitted to

the Council and the roll approved, and it was considered an authentic roll of the Creek Nation."

On page 53 of the record, Mrs. E. H. Allen, speaking of G. W. and Willie Posey, says "they were proven citizens of the Creek Nation and were placed upon the Census Roll of said Nation," and on page 57 of the record, she says: "Of Ben and Lulu, Trudie and Ambrose Posey, that they were proven citizens of the Creek Nation and were placed upon the Census Roll of said Nation."

To the same effect is the testimony of John and Robert Barber, as to G. W. Posey and Willie Posey, page 53 of the record.

On page 55 of the record, Hugh R. Johnsons says that he is the husband of Jennie Johnson, daughter of Eli Posey and a resident of the Creek Nation, where he and his wife have lived for the past ten years; that his wife's name is upon the Census Roll of 1890 of Broken Arrow Town in said Creek Nation, and she drew annuity money from the United States, as a Creek Indian by blood.

On page 56 of the record is the following certificate of L. C. Perryman, then Principal Chief of the Creek Nation: "Executive Office, Tulsa, Indian Territory, December 5, 1892. This is to certify that Jennie Johnson and her children, Clarence, Fannie and T. D. Johnson are all on the rolls of the Broken Arrow

Town upon the certified rolls, and are entitled to per capita payment as Creeks, L. C. Perryman, Principal Chief."

On the same page of the record, Joseph Mingo, states: "That he is acquainted with Jennie Johnson and knows that she was on the rolls and received her pro rata part of the money from the Creek Nation in the year 1891.

In record page 66, George Tiger, says: "All the people in the Barber, Posey, Jennie Johnson and others were rejected at that time, I had known Barber a long time before that. The persons struck off by the Committee were all on the Creek Rolls and had been approved by the Council before that time."

At page 67 of the record, N. B. Childers, who was then District Judge of Coweta District, says: "In the year 1892 while I was Judge of Coweta District I got an order from L. C. Perryman, who was Principal Chief of the Creek Nation, to investigate the citizenship of the Barbers and Poseys who lived near Wagoner. There had been some report made to him about them and he wanted the matter investigated by me. Complaint had been made to him that the Barbers and Poseys were going into some contract pastures and making farms, and that they were not citizens. When I got notice from him I notified Jim Barber and the others through my officer to meet me at the court house on a

certain day, with their evidence. They met me on that day and I held the investigation. I notified Joe Mingo, who was the Chief of Broken Arrow Town, to which these parties claimed to belong to be there and he was present on the day. I took the testimony of the witnesses that they produced there, citizens. I questioned the witnesses closely myself, and the evidence went to show that they were citizens and had a right there. The evidence is on the record. I then had a talk with Mingo, and he informed me that they had the same evidence all the time, and that they were entitled to citizenship, and for that reason he had them on his town rolls. I then made a report to the Chief to the effect that they had a right there as citizens. That seemed to settle the question, and they remained there as constituents of Broken Arrow Town, and the Town Chief kept them on his rolls until they were taken off the rolls. I recognized them as citizens until they were taken off the roll. \* \* \* \* \*

It was the custom for a great many years for the Town Chiefs to keep a roll of the citizens of his own town and when he came to the Council no question was made as to the names on his roll. \* \* \*

Finally the Committee of "Eighteen" was appointed to investigate the rolls. When the Committee investigated the rolls they did not notify the parties whom they were investigating. They too took up the different names and if they



thought they should not be on the rolls their names were scratched off. I was before the Committee several times, the Barbers and Poseys were scratched off at that time."

On page 62 of the record, Mrs. E. H. Allen, says :  
"That the said above named R. F., R. W., H. J. and L. E. Barber were proven citizens of the Creek Nation and were placed on the Census Roll of said Nation. On page 63 the same testimony is given by John C. and Robert T. Barber. On page 64 the testimony of Joseph Mingo is to the same effect. On page 71 of the record, Ellis Childers, who was one of the committee, says :  
"The Broken Arrow Town was brought up first and finally they struck the Barbers and Poseys. I am well acquainted with the family, and knew their connection and I made an objection to Jim Barber, George Eli Posey, the Coker family and the Stocktons and a number of others. I tried to make an objection to half of them but do not know whether I got half of them or not. \* \* \* \* I was trying to get my revenge. The Committee took my word and scratched them off. Those were the legal rolls of the Creek Nation. \* \* \* \* These people were not notified and were given no chance to prove their rights. These parties have been considered citizens both before and after that time. They have exercised the rights of citizenship and have been tried in our

courts and forced to do public duties. I summoned Posey, Morgan and Barber as militia, when I was Captain of the militia in the Cook Gang trouble. The Supreme Court decided that the Alien Act was unconstitutional and that the Council could not pass an act depriving any person of Creek blood of their rights in the land."

This testimony shows that they were on the rolls, otherwise they could not have been scratched off, and that they were the legal rolls of the Creek Nation; and in passing, we call attention to the fact that Mr. Childers testifies that the Supreme Court of the Creek Nation had decided that the Alien Act was unconstitutional and that the Council could not pass an Act depriving any person of Creek blood of their interest in the land.

Lewis McGilbra, who was one of the Committee of "Eighteen," says: "The rolls before the committee were the regularly authenticated rolls of the towns. \* \* \* Ellis Childers came in and objected to the Barbers, Poseys, Berryhills and a whole lot of others, and they were all struck off the rolls. We had no right to decide as to their rights of citizenships, but this was done to keep them from drawing their per capita money." Record page 72.

Moses Smith, another member of the committee of "Eighteen," in his testimony, says: "When the investigation began, one man would object to the names

on the rolls of another King, and that King would object to the names on the rolls of the first King, and finally it got to be a fight between them. The Town Kings had a right under the Act of Council to make a correct list of the members of their towns, and if it had not of been for certain prejudice that existed among the members of the Council that caused the creation of this Committee, there would not have been any names scratched off whatever. I learned, from being in the position I was in, that this Committee was organized to exercise—which they did—a great deal of prejudice work, which is sometimes practiced by the politicians of the Creek Nation. As near as I can remember, this took place during the May session of the Council, 1895. If this Committee had not been appointed there could not have been any scratching, because the Kings had the authority to make up the rolls of their towns. They were the legal rolls. These rolls made up by the Kings which were submitted to the Committee of "Eighteen" were the last rolls that have been made up under the autghority of the Creek Nation, as far as I know. I remember the names of James Barber, Mollie Stockton, George Eli Posey, George A. Posey, Morgan, Mary A. Wassom, Mrs. Coker, Ben Posey and a great many others."

Attention is respectfully again called to the full statement of James M. Barber, pages 74-76.

Warrior A. Rentie, a member of the Committee of "Eighteen," in his testimony at page 77, says: "There were a number of these Poseys and Barbers scratched off the rolls. There seemed to be some trouble between the Town Kings and the members of the towns, one man would have some name scratched off the rolls of some town, and then the member from that town as an act of retaliation, would have names scratched off the rolls of the town of the first man. The Committee used what were regarded as the authenticated rolls. These were the authenticated rolls up to that time. If this scratching had not taken place the rolls that were used would have been the rolls confirmed by the Act of Congress of June 10, 1896."

Mr. Rentie is a lawyer by profession and we submit that his testimony is entitled to the greatest consideration.

On page 78 of the printed record, Gabriel Jamison, another member of the Committee of "Eighteen," says: "Some of the Poseys and Barbers were struck off while I was before the Committee, and some of them were kept on the roll. The Committee was using the regular authentic rolls of the Creek Nation. These were the same rolls with the exception of the scratched names that were in existence at the time the Dawes Commission took charge in June, 1896."

We think it cannot fairly be doubted in the face

of all this testimony that these appellants were enrolled upon the regular authentic rolls of the Creek Nation, and enrolled because they were of the Creek blood. Very much of this testimony is given by highly respectable officers of the Creek Nation, interested in preserving the integrity of their rolls. They remained upon it until May, 1895.

We deny the right or power of the Creek Council or of any committee appointed by authority of the Council, directly or indirectly, to de-citizenize and disinherit any resident Creek Indian by blood.

The power has heretofore been recognized by the Government in the tribal authorities to determine who are members of the tribe, but that power has long since been taken away, and since the report of the Dawes Commission, dated November 18, 1895, showing that in making the rolls and in unmaking them and making citizens and unmaking them by the tribal authorities their conduct had been characterized as in "disregard of the plainest principles of law and marked by the grossest injustice, and that the roll had become a mere political football." Congress has undertaken through a committee appointed by the President to determine who are citizens of the various tribes without any regard to tribal authority. This power though questioned and disputed by the tribal authorities is clearly within the power of Congress, and the law of

June 10, 1896, authorizing the Dawes Commission to make a roll was clearly within the scope of its legislative power.

In the case of *United States vs. Kagama*, reported in the 180th United States, page 375, this court said: "While the Government of the United States has recognized in the Indian Tribes heretofore a state of semi-independence and pupilage it has the right and authority instead of controlling them by treaties to govern them by Acts of Congress, because they are within the geographical limits of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact."

That clearly settled the question of power in Congress by the Act of June 10, 1896, to confirm the existing roll and to authorize the Dawes Commission to add to the rolls.

But even when the power was recognized as in the tribal authorities to determine who were members of the tribe, the power ended there and in no way involved the power to limit or qualify the rights of those found to be tribal members by blood. Membership by blood once settled, it was beyond the power of the Creek Council even in direct terms and by direct legislation to divest the right vested in the Creek blood by virtue of the patent to the Creek Tribe of Indians, of which

these appellants are fixed as part and parcel, whenever they establish their Creek blood and their residence in the Creek country. That one cannot be divested of a vested right in property by legislative action is a principle of law too well understood to be questioned.

In Tiedeman's Limitation of Police Power, section 116, pages 335 and 336 it is said: "But when the right to the public enjoyment of lands is purchased by the individual it becomes a vested right, of which he cannot be divested by any arbitrary rule of law.

\* \* \* \* \* It is sufficient for us to be able to say that when one becomes the tenant of the state or acquires an absolute title to an estate in land whether that estate be in fee, for life, for years or otherwise, his interest is a vested right, which is protected by the constitutional limitations against any arbitrary changes by legislation."

Further under the head of involuntary alienation, section 120, he says: "As a general proposition the legislature cannot divest one of his vested rights against his will." Again Mr. Cooley in his work on Constitutional Limitations, says: "Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations, without a judicial hearing, after due notice, would be void as not being due process of law." Cooley's Constitutional Lim., page 444, 6th Ed.

The prohibitions in the Constitution of the United

States, found in Articles 1 and 14, that no state shall pass any law impairing the obligation of contracts, nor shall any state deprive any person of life, liberty or property without due process of law, ought to be sufficient to restrain these Indian Councils. For what these sovereign states cannot do may certainly be denied to these Indian Nations. The Creek blood of these appellants had been established. They had been placed upon the authentic rolls of the Creek Nation and for years recognized as members of the tribe by blood. Many of them exercising official functions; receiving payments of National monies, and it was beyond the power of the Council, directly or indirectly, to legislate away their vested rights in the Creek lands and property. The Creek blood established, there is no legislative power on earth, equal to the task of confiscating their vested rights in this property. If the Council could not do so by direct legislation it could not authorize its Committee of "Eighteen" to do so. We think it will take something more than running a pen across the name of a Creek Indian by blood, something more than the erasure of his name from an authentic National Roll by an unauthorized Committee, inspired, as the testimony shows this one was, by motives of revenge, to change a Creek Indian into a white man, or to take from him his Creek blood and vested rights. If the Creek Council itself had the power by direct legislation,



to legislate away the rights which inhere in the Creek blood, it might de-citizenize all the Creeks except members of this Council and Chief, and thus vest that vast public domain in themselves.

But we insist that the Act of the Creek Council of May 15, 1895, nor the Act of May 17, 1895, directing the Committee did not contemplate any final action on the part of the Committee. We quote the following clause from the Act of May 17, 1895: "Be it further enacted, the Committee of "Eighteen" appointed by act of the extraordinary session of Council, approved May 15, 1895, to examine and correct the Census Rolls of 1895, are hereby instructed and directed to entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in this Nation, and strike from the rolls and preserve a correct list of all the names so stricken out and report the same to the present session of the Council."

Certainly the terms of this act are sufficient, if they were not intended to *give the widest scope* to the prejudice and revenge of any person who might come before the Committee and be able to present himself as a respectable citizen. All he had to do was to be a respectable citizen and in good faith urge the dropping of the names from the roll, and the thing was done, and citizens of the quarter blood, half blood and full blood,

and Committee discharged.

Respectfully,

M. J. SMITH, Cairman.

MILDRED McINTOSH, Clerk.

Approved June 8, 1895.

This report of the Committee was followed by no act or resolution introduced either in the House of Kings or the House of Warriors or passed by either body or approved by the Chief.

The first section of Article 1 of the Constitution of the Creek Nation is as follows: "Article 1, Section 1, The Law making power of this Nation shall be lodged in the Council, which shall consist of two houses, the House of Kings and the House of Warriors."

Section 4 of the Article 2 of the Constitution reads as follows: "Whenever any bill or measure shall pass both houses it shall be submitted to the Principal Chief for his approval or rejection, if he shall approve it, it shall become a law, if he shall object to it, he shall within five days return it accompanied by his objections to the house in which it originated."

There was no legislative sanction or approval given to the report of this Committee by either the House of Kings or the House of Warriors as required by the first article of their constitution.

There was no act or resolution which purported to have passed either the House of Kings or the House of

Warriors, submitted to the Principal Chief for his approval or rejection, so we maintain there is not and never was any legislative vitality in this proceeding, even if the power had existed in the Council to give it the effect claimed, and so we say there is no valid action taken by any lawful authority of the Creek Nation to remove the names of these appellants from the authentic rolls of the Creek Nation as they existed in 1895, but the rolls continued in legal effect so to exist until the passage of the Act of Congress of June 10, 1896, and that act confirms the roll as it then legally existed with the names of these appellants upon it.

Again it is contended on the part of those representing the Creek Nation that the act of the Creek Council called the Alien Act, approved October 26, 1889, debars some of these appellants from their Creek rights. This Act is found on page 105 of McKellop's Digest of the Creek laws. The first section is as follows: "All persons who were born, or who may be hereafter born, beyond the limits of the Indian Territory, and may have heretofore been entitled to make application for citizenship, on account of Indian blood or tribal adoption, and who have continuously resided beyond, or outside of the jurisdictional limits of the Muskogee Nation, for the period of twenty-one years, are hereby declared aliens, and not entitled to citizenship in the Muskogee Nation, or to any of the privileges

thereof." The fourth section is as follows : "This Act shall not apply to persons who have heretofore filed application for citizenship and where cases are now pending." All these appellants, except James M. Barber, and his children, were residing in the Creek Nation at the time of the passage of this Act. He had formerly, in 1872, resided in the Creek Nation, and finally returned from Texas to make the Creek Nation his permanent home in 1890, within about one year after the passage of this Act. He is not embraced within its terms, for he had not resided outside of the Creek Nation for twenty-one years before the passage of this Act, if that would be claimed to bar him, for according to the testimony, he first came to the Creek Nation in 1872, remained there awhile and then returned to Texas, all the time claiming the Creek Nation as his home, returning to the Creek Nation in 1890. It is impossible to crowd twenty-one years between 1872 and 1890, therefore he does not fall within the conditions prescribed by the Alien Act, for disinheriting him. But we insist that as this Act proposes to confiscate by legislation the vested property interest of Creek Indians by blood, it is inoperative and unconstitutional, and Judge Adams correctly so decided it ; and we further contend that James M. Barber comes within the provision of the fourth section of this Act. His application for citizenship, having been filed and actually proved up long be-

fore the passage of this Alien Act.

On page 52 of the record, Mrs. Lucinda A. Smith, says : "Benjamin Posey was the father of the following named persons and that he proved up their rights as citizens of the Creek or Muskogee Nation, said proof was made before Judge Reed, District Judge, Sarah A. Barber, nee Posey ; \* \* \* and she further states that the proof was also made for the children of the foregoing parties mentioned." The testimony shows that James M. Barber was one of the children of the above named Sarah A. Barber, nee Posey. At the time of making her affidavit Mrs. Smith was sixty-four years of age and the niece of Benjamin Posey. On page 51 of the record is found the affidavit of Benjamin Posey, made on the 15th day of September, 1882, when he was seventy-six years of age. He names among others of his children, Sarah A. Posey, who married Silas H. Barber, the father of James M. Barber. The testimony shows that afterward, Benjamin died and was buried in the Creek Nation. On page 54 of the record is found the testimony of Shelton Smith, who states : "He was acquainted with Benjamin Posey and Eliza Posey, his wife, and that they were recognized as Creek or Muskogee Indians by blood and descent ; that he was present at the time when Benjamin Posey proved up the rights of his children before Judge Reed, who was Judge of the Okmulgee

District in the Creek Nation according to law. The following named persons are the sons and daughters of Benjamin Posey, whose rights were proven up by the said Benjamin Posey before Judge Reed as above stated. The rights were acquired through blood and not adoption, Sarah A. Barber, nee Posey," and he names others of the said children. This testimony showing the application for James M. Barber, by his grandfather, and that his rights were proven up, is further corroborated by the following Committee report filed in the Council October 20, 1890, on page 45 of the record :

COMMITTEE ROOM, OKMULGEE, I. T., Oct. 20, '90.

HONORABLE NATIONAL COUNCIL :

GENTLEMEN : We, your Committee, to whom was referred the application of Benjamin A. Barber, Harrison E. Barber, Mariah E. Barber, Eva A. Barber, Bennie Barber, James M. Barber, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl J. Barber, Niles Barber, M. S. Coker, Silas G. Coker, James M. Coker, Robert Coker, Eva Coker, Maud F. Coker, Hardy J. Barber for citizenship in the Muskogee Nation have carefully considered same and would recommend to your honorable body the adoption of the following Act, to-wit :

Very respectfully,

THOMAS KNIGHT, Chairman."

“Be it enacted by the National Council of the Muskogee Nation, that Benjamin A. Barber, Harrison E. Barber, Mariah E. Barber, Eva A. Barber, Bennie Barber, James M. Barber, Sarah E. Barber, Bertie E. Barber, John S. Barber, Pearl J. Barber, Niles Barber, Mary S. Coker, Silas G. Coker, James M. Coker, Robert Coker, Eva Coker, Maud F. Coker, Hardy J. Barber, be and are hereby declared citizens of the Creek or Muskogee Nation by reason of Indian blood.

Adopted :

WARD COACHMAN, President H. of K.  
A. P. S., Clerk pro Tem.”

It is impossible therefore to conclude, after a consideration of all this testimony, that any of the appellants are included within the terms of the Alien Act; but if they were their rights could not thus be legislated away.

It is further contended, on the part of those representing the Creek Nation, that the District Courts of the Creek Nation had no power to hear and determine applications for citizenship. The learned Judge, who tried this case, concedes that the District Courts of the Creek Nation have the jurisdiction to hear applications for citizenship, but contends they have no jurisdiction to try or decide them. The first section of the Act conferring jurisdiction on the District Courts found on page 63 of Perryman's compilation of the Creek laws,

is as follows : "Section 1 : All persons having resided out of the limits of the Muskogee Nation and whose rights as citizens of the same may seem to be questionable in consequence of intermarriage with non-citizens, shall be bona fide citizens of this Nation, provided they can prove, to the satisfaction of the proper authorities, that they are of Muskogee descent, and not further removed than the fourth degree." Section 2 : Has no bearing upon the question, but the Third Section is as follows : "Section 3 : Any person claiming citizenship under these provisions, shall, in order to establish his or her rights, prove the same by a responsible, disinterested native witness before the District Court."

Section 1, Article 4 of the Constitution of the Creek Nation, is as follows : "Section 1 : The Muskogee Nation shall be divided into six districts, and each district shall be furnished with a Judge, a Prosecuting Attorney and a company of Light-Horsemen."

"Section 2 : The Judge shall be chosen by the National Council for the term of two years. He shall try all cases, civil and criminal, where the issue does not exceed \$100."

Mr. Blackstone, says : "A court is a place where Justice is judicially administered."

The First Section of the Creek Act above quoted, says : "They shall be bona fide citizens of this Nation, provided they can prove to the satisfaction of the proper



authorities that they are of Muskogee descent." The Third Section, names the proper authorities before whom this proof shall be made ; that is, they shall prove the same before the District Court ; and we fail to see why they should be sent to this Court or place where "Justice is judicially administered" with their proof, unless that proof is to be followed by the judgment of that Court. The learned Judge, who tried this case below, on page 32 of the record, says : "This section can only be construed as conferring on the Court the power to receive the proof of citizenship and report the same to any tribunal authorized to confer it. This seems to be the construction which was given to the Act by N. B. Childers, who in his testimony in this case, taken before the Special Master, Mr. Gibson, states that he received a notice from Chief Perryman to investigate the citizenship of the Barbers and the Poseys and that after making investigation he made a report to the Chief to the effect that they had a right there as citizens." The learned Judge overlooked the Judgment which was rendered in that case by Judge Childers, which appeared in the record he was then considering, found on printed record, page 82, in these words : "After questioning the witnesses in Barber and Posey case, I, N. B. Childers, Judge of Coweta District, rule and so decide, that the claimants heretofore mentioned, were citizens of the Muskogee Creek Nation and entitled to enrollment.

Witness my hand this the 13th day of June, 1893,  
and the Seal of Coweta District.

N. B. CHILDERS,

Judge of Coweta District, M. N."

And so we say that the fifth, sixth, seventh and eighth assignments of error are sustained.

We respectfully insist that these appellants show themselves by undisputed testimony to be members of the Creek Tribe by blood, that they have been long recognized by the National authorities as members of the tribe, and as such invited and encouraged to make homes and valuable improvements upon the ~~land~~ <sup>land</sup> granted and conveyed for their benefit by the Government of the United States.

And we further respectfully insist that they were upon the authenticated rolls of the tribe and confirmed by the Act of Congress of June 10, 1896, and are now entitled to enrollment under the order and decree of this Honorable Court.

WM. M. CRAVENS,

*For Appellants.*

461 4 54.  
MAR 29 1899

JAMES H. MCKINNEY,  
Clerk

*of DuVal for Appellants*  
the Supreme Court of the United States.

*Filed Mar. 29, 1899.*

JOHNSON ET AL,

*Appellants.*

VS.

No. 461

NATION,

*Appelles.*

MORGAN ET AL,

*Appellants,*

VS.

No. 454.

STATES,

*Appelles.*

Briefs in Behalf of the Appellees.

BEN T. DUVAL,  
Attorney for the Muskogee Nation.

In the Supreme Court of the United States.

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JENNIE JOHNSON ET ALS.,

*Appellants.*

vs.

CREEK NATION,

*Appellee.*

No. 461

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Brief in Behalf of the Appellee.

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This is an appeal from the judgment of the United States Court of the Northern District of the Indian Territory, rendered June 16, 1898, affirming the judgment and decision of the Dawes Commission denying the admission and enrollment of the appellants as citizens of the

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Creek Nation. The appeal is taken under the provisions of the Act of Congress, approved July 1st, 1898.

Statutes 2d Session, 55th Congress, page 591, which reads as follows: "Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in citizenship cases, and in all cases between either of the Five Civilized Tribes of the United States involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in 120 days from its passage; and in cases decided subsequent thereto, within 60 days from the final judgment. \* \* "

The question which meets us upon the threshold, is as to the power of Congress to grant the right of an appeal in the cases decided before the passage of the act which was approved July 1st, 1898, four days after the rendition of the judgments in these cases.

The law under which the Dawes Commission passed upon citizenship cases was approved June 10th, 1896, and after prescribing the procedure before the Commission the following provisions were incorporated therein: "*Provided*, That if the tribe, or any person be aggrieved by the decision of the tribal authorities, or the Commis-

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sion provided for in this act, it or he may appeal from said decision to the United States District Court: *Provided*, However, That the appeal shall be taken within 60 days, and the judgment of the court shall be final."

The appellants appealed from the decision of the Dawes Commission rejecting their application, and refusing to enroll them as citizens of the Creek Nation, to the Court below, and after a long and tedious examination of witnesses before the Special Masters, the Court in an exhaustive opinion, after commenting upon the testimony and citing the laws of the Creek Nation in reference to citizenship therein, entered a judgment against their right. This decision was rendered as before stated on the 16th day of June, 1898, and according to the law as then existing, that judgment was final. (Tr. pp. 29-43.)

Could Congress divest the Creek Nation of the right secured by that judgment by subsequently granting an appeal to this court?

*Rights secured by judgment cannot be divested.*

Wade on Retroactive Laws, Sec. 172, page 73.

Atkinson vs. Dunlap, 50 Me. 111.

It is universally held that rights secured by a judgment are vested rights, and are protected by the following provisions of the Fourteenth Amendment of the constitution: "No state shall make or enforce any law which shall prejudice the privileges or immunities of any citizen

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of the United States, or deprive any person of life, liberty or property without due process of law."

This protection not only applies to state legislation, but also to the legislation of Congress.

Hill vs. Sunderland, 3 Vt. 570.

Black on Constitutional Prohibitions. Sec. 197.

The legislature has no constitutional power to grant an appeal or writ of error where no such rights existed when judgment was pronounced. A statute authorizing the opening of judgments rendered before its passage impairs vested rights and infringes upon the judicial Department.

Black on Const. Prohibition, Sec. 198, 199.

Merrill vs. Sherburne, 8 Amer. Dec. 52.

Burt vs. Williams, 24 Ark. 91.

1st Freeman on Judgments, Sec. 90.

Smith Stat. and Con. Law, Sec. 340.

If the power of Congress to grant appeals is conceded, the jurisdiction of this court is limited in these cases to the trial and determining the constitutionality or validity of the legislation of Congress affecting citizenship in the Creek Nation. It is not to the interest of the appellees to establish the constitutionality or validity of such legislation.

If this court should hold that such legislation is unconstitutional, the cases would be dismissed for want of jurisdiction, and the appellants remitted to the condition that

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they occupied when this litigation began, that is, non-citizens of the Creek Nation with no tribunal to adjudge them otherwise, and no authority to create one. The constitutionality or validity of this legislation is not brought before this court by the assignment of errors. There are eighteen assignments of error and all of them amount substantially to the assertion that the court erred in not adjudging that the appellants were entitled to be enrolled as citizens of the Creek tribe.

The court below, in its opinion cites the various acts of the Creek Council upon the subject of citizenship, and correctly finds that the National Council of the Muskogee Nation is the only authority which could admit persons whose citizenship was questioned. Commencing with the first authentic act which is found on page 63 of Perryman's Digest down to the Act of May 30, 1895, creating the Citizenship Commission the written law required decisions or findings of the court to be reported to the Council for its approval.

The testimony of the witnesses shows that where enrollment of parties whose right to citizenship was doubtful were made by Town Kings, the validity of such enrollment was to be determined by the Council.

See the testimony of N. B. Childers, page 66 Tr.

Jo. Mingo, page 68 Tr.

Moses Smith, page 73 Tr.



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We assert that in no case does the testimony show that any other authority than the Council of the Muskogee Nation had a right to enroll parties whose citizenship was questioned, without submitting the same to the Council. The Act of Oct. 26, 1889, known as the "Alien Act," the court found to be the proper exercise of the inherent power of the Creek Nation to declare who were the legal citizens thereof. The appellants in this case complain that they were unjustly and unlawfully stricken from the rolls by the Citizenship Committee of Eighteen, created by Act approved May 15, 1895, and the Act of May 17, 1895. The preamble of these two Acts show the reason for creating that Committee. It was not for the purpose of trying and determining who were citizens, but simply for the purpose of striking from the rolls persons who had been placed thereon by fraudulent methods.

This Committee reported to the Council the rolls as corrected by it and the names of persons, numbering 618, who had been stricken from the rolls, and whose right to citizenship was in doubt.

The preamble to the Act of May 30, 1895, creating the Citizenship Commission, discloses the intention of the Council, and that it was a gracious measure enabling those who had been stricken from the rolls by the Eighteen Committee and were put on the doubtful list to establish their right to citizenship.

The roll made by the Eighteen Committee was reported to the Council and approved and adopted, and the roll was taken as a basis for the representation in the National Council.

The Dawes Commission and the Court below have passed upon the testimony presented and have found that it was insufficient to establish that the applicants were entitled on account of blood and residence to be enrolled as citizens of the Creek Nation. Part of them were excluded by the "Alien Act," of October 26, 1889. They were born outside the limits of the Creek Nation, and had remained absent for the period of 21 years without making an application, in good faith, to be admitted to citizenship. The court found that the District Court had no authority to admit persons to citizenship. It also found that the mere enrollment of a non-citizen by the town King, did not entitle the parties to the rights of citizens. These findings are assigned as errors for which the appellants ask for reversal.

The prevailing opinion when this question of citizenship was first agitated was, that blood was the only test; that if an applicant for citizenship could show that the smallest quantity of Creek blood flowed in his veins, he was entitled to all the rights and privileges of a citizen of the Creek Nation. A subsequent examination of the laws relating to citizenship generally, and especially in the

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Creek Nation, showed this to be erroneous.

The Creek Nation contends and the Court held, in order to entitle one to recognition as a citizen of said Nation, entitled to the full benefits thereof, it required both blood and residence.

See Tr. page 29-43 opinion of the Court.

The time allowed by the Court for filing briefs is so short that the attorney for the appellee is unable to go elaborately in the presentation of authorities, and acts of the Council upon citizenship. The question of the jurisdiction of this court under the acts of Congress has been fully and exhaustively presented by the attorney for the Cherokee Nation, and upon that point, the position of the two Nations is identical.

If this court should find that the legislation of Congress was unconstitutional, and invalid all the appealed cases would be dismissed; and if the court should find that Congress had the right to grant appeals in cases which had been decided by the court, which under the law was to be final, prior to the passage of the Act of Congress granting the appeal, then the question arises whether the jurisdiction of this court was restricted to the trial, and determination of the validity and constitutionality of the Acts of Congress affecting citizenship in the Creek Nation.

The contention of the appellants is that they are Creek

Indians by blood; that they had been enrolled as citizens of the Creek Nation, and were unjustly stricken from the rolls by the Citizenship Committee of 18 created by Act of the Creek Council approved May 15, 1895. Counsel for the appellants did not see fit to quote the language of the Act of May 15, which is as follows: "That a special Committee to be composed of 6 members of the House of Kings and 12 members of the House of Warriors be appointed to take charge of the census rolls of the various towns and carefully examine the same, and ascertain whether or not they are correct; and if any of them be found to contain the names of non-citizens, such names shall be expunged from the rolls, and reported separately to the National Council, and the acts of the special Committee shall be subject to the approval of the National Council."

The preamble to the supplemental Act approved May 17, 1895, declares that "It had become notorious that by questionable and unjust methods and practices many non-citizens had been counted as citizens and participated in the per capita distribution of public funds."

The Committee of 18 were instructed to entertain, and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in the Nation, and strike from rolls and preserve a correct list of all the names so strick-

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en out to the present session of the Council.

See Pamphlet Acts of the Creek National Council of the sessions of May, June and December, 1895, pages 1 and 2.

The counsel for the appellants quotes the report of the Committee of 18 to the Council in conformity with the above cited Acts, which was adopted June 8, 1895.

See pages 12 and 13, of the Acts above cited.

The counsel for the appellants on page 38 of his brief uses the following language: "This report of the Committee was followed by no act, or resolution introduced either in the House of Kings or the House of Warriors, or passed by either House or approved by the Chief." He further asserts on the same page, "There was no legislative sanction, or approval given to the report of the Committee by either the House of Kings or the House of Warriors, as required by the first Article of their Constitution." He concludes as follows: "So we maintain there is not, and never was any legislative validity in this procedure, even if the power had existed in the Council to give it the effect claimed, and so we say there is no valid action taken by any lawful authority of the Creek Nation to remove the names of the appellants from the authenticated rolls of the Creek Nation as they existed in 1895, but the rolls continued in legal effect as they existed until the passage of the Act of Congress of June 10, 1896, and

that Act confirms the roll as it then legally existed, with the names of these appellants upon it." These assertions show the ignorance of counsel of the laws of the Creek Nation, and the haste in which he prepared his brief. On the same page of the Session Acts where he found the report of the Committee which he quotes, and immediately following it is the following: "Be it enacted by the National Council of the Muskogee Nation in extraordinary session assembled: That each town of the Muskogee Nation is hereby required and instructed to base its next general election in September, 1895, for members of the National Council upon the number of citizens as shown by the census reported by the Committee of 18 to the Council on June 8, 1895." (Here follows the names of the towns, the number of citizens, and the representation in the House of Kings and in the House of Warriors). And concludes, "Until some future emergency shall necessitate a different apportionment. Approved June 8th, 1895, pages 13 and 14 of the Session Acts, above cited."

This was a most emphatic approval of the report and an adoption of the rolls made by the Committee.

The appellants complain bitterly that their names were stricken off arbitrarily by the Committee, "and that they had no notice or knowledge of what was going on, and insist that their action ought to have no judicial sanction," and bases this opinion upon the testimony of Ellis Child-

ers and others who testify as to the conduct of the Committee in correcting the census rolls.

On pages 72 and 73 of the transcript, Louis McGilbra, a witness, testifies that he was King of Hickory Ground Town, and a member of the House of Warriors, and also a member of the Committee. "The Committee made a list of those they had scratched off and sent it to the Council. The Committee did not mean exactly to deprive these parties of their rights, but according to our instructions we had to strike them off when anyone objected to their names, and we understood that there was to be some other tribunal in which they could establish their rights to citizenship."

It is true that the testimony of some of the witnesses shows that the conduct of the Committee was not commendable, but the Council, which had a good opportunity of knowing what had been done, approved and adopted the action of the Committee by the act above quoted, fixing the basis of representation upon the census so made. The tribunal referred to by Louis McGilbra was created by Act approved May 30, 1895, page 5 of the Session Acts, in the preamble of which it is stated "That it is currently reported and believed by many that a large number of claimants who have heretofore appeared before the Committee of the National Council on Citizenship, and other authorities of the Nation, and established or ob-

tained recognition of their claim to citizenship in the Nation, accomplished the same by the undue use of money and through fraudulent means, and that in former actions involving the question of citizenship the Nation had no representative to appear as attorney and defend her interest in that behalf:

It was enacted by the Council that a committee to be styled the Citizenship Commission, to be composed of five of the most competent citizens of the Nation, whose duty it shall be to sit as a high court to try, and determine and settle all and only such questions as shall involve the right to citizenship in the Muskogee Nation that shall be presented to it, either by claimants or the duly authorized representatives of the Nation."

It is further provided therein, that the Commission organized should give public notice in all the newspapers published in the Nation, of the time and place of its meeting at least thirty days previous to such meeting; its sessions to be held in the council house at Okmulgee, the first to be on the 2d Tuesday of July, 1895. It is further provided in said Act that all persons claiming citizenship in the Muskogee Nation might appear before the said Commission, and prescribes the mode of procedure therein.

The Act made ample provision for the appellants and all other persons to establish their right to citizenship;



and it is carefully drawn so as to protect the rights of the Nation and all persons, and this court continued in existence until Sept. 30, 1896. The Council by an Act approved August 7, 1896, required that the Citizenship Commission should complete its work September 30, as above stated.

The Act of Congress of June 10, 1896, conferring jurisdiction upon the Dawes Commission to hear and determine the applications of all persons applying for citizenship limited the time for making such applications to three months after its passage, which would be until the 10th day of September, 1896.

The appellants assert that they made application to the Citizenship Commission and were unable to obtain a trial, and they subsequently applied to the Dawes Commission, which rejected their claim, and they appealed to the court below. They insist that the census rolls referred by the Council May 15, 1895, were the authenticated rolls of the Creek Nation.

This contention is unfounded, because the Council of the Creek Nation was the highest authority upon the subject of citizenship, and in the acts above cited it is declared emphatically that the rolls were incorrect, and a great number of persons were on them improperly, and that was the reason for referring them to the Committee of 18, and the rolls as corrected by them reported to the Coun-

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cil and approved were the first authenticated rolls of the Creek Nation.

There were others who were admitted by the Citizenship Commission, and the Dawes Commission, and the United States court for the Northern District on appeal, who were entitled to citizenship in the Creek Nation, but the appellants belong to neither of these classes.

The counsel for the appellant says in his brief, page 31, "We deny the right or power of the Creek Council, or any committee appointed by authority of the Council, directly or indirectly, to decitizenize and disinherit any resident Creek Indian by blood." We say he is mistaken in his assumption, but if he were correct, the appellants in this case have been rejected not only by the Committee of the Creek Council, but by the Dawes Commission, and the United States Court for the Northern District of the Indian Territory. There is no ground for complaint on their part as to their treatment by the United States court. Their case was referred first to N. A. Gibson, special master, who was by order of the court directed to receive and consider all affidavits, documents and testimony which the appellants might produce, and after a careful examination he reported the case back to the court with his conclusion; and afterwards, the appellants being satisfied that the court would not admit them, asked for the case to be re-referred to R. P. de Graffenreid, who was

also a special master; he examined all the testimony which the appellants produced before him and he reported favorably to their claims to citizenship, but the court in an exhaustive opinion in which he carefully cited the laws applicable to their claim, and also the testimony, decided against them, and affirmed the judgment of the Dawes Commission.

We contend that the testimony produced is insufficient under the laws of the Creek Nation to entitle them to enrollment, and the court was satisfied from the testimony that their names upon the rolls of Broken Arrow Town were not lawfully there, and that they belong to the class of persons the Council had in view in creating the 18 Committee, which was expressly intended to correct the census rolls.

They urge that they had no notice of the action of that Committee, but they did have notice of the creation of the Citizenship Commission, and of the time and place of its sessions by notice published in all of the newspapers in the Creek Nation, and if they did not avail themselves of the opportunity thus afforded to them it was their own fault. They did go before the Dawes Commission, and there failed to show that they had been improperly stricken from the rolls by the said Committee. It is shown above that they were not on any citizenship roll of the Creek Nation on June 10, 1896, or at any subsequent

time, and we assert they never were lawfully upon any roll.

The counsel for the appellants contends that by virtue of blood alone, they were entitled to an interest in the lands which was vested in them under the treaty of 1834, and the patent issued in conformity therewith. The patent to the Creek Nation is substantially the same as the patent issued to the Cherokees.

This court, in the case of the Cherokee Trust Fund, 117 U. S. Reports, 308, in commenting upon the title, uses this language: "The lands were held for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common that he could claim a pro rata portion of the sales made of any part of them.

He had a right to use parcels of the lands thus held by the Nation, subject to such rules as the government authorities might prescribe."

In the court of claims, in the Cherokee Nation vs. Journey-Cake, the following emphatic language is used:

"It is apparent that the public domain of the Cherokee Nation is analogous to the public lands of the United States, or the Demesne lands of the Crown, and that it is held absolutely by the Cherokee Government as the public property is held in trust for governmental purposes, and to promote the general welfare."

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155 U. S. Report, 211.

It is clear from the above that no right to the land inheres to the individual on account of Creek or Muskogee blood alone.

The court below follows the above quoted decision and held as follows: "The government of the United States concedes to the Creek Indians, by the treaty of April 4th, 1832, the right to govern themselves so far as might be compatible with the general jurisdiction which Congress may see proper to exercise over them." By the 3d Art. of the treaty of April 12, 1834, it is provided as follows:

"The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States; and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them."

The article just quoted, from the treaty of 1834, sets forth in substance the provisions of the patent to the Creek Nation given by the United States to the lands which they now hold in the Indian Territory. In commenting upon the patent to the Cherokee Nation, in the opinion heretofore rendered, this court held that the patent was to the Nation, and not to the individual Indian,

and the opinions set forth at that time in reference to the Cherokee Nation's patent will be carried out so far as the Creek patent is concerned. While these patents differ slightly in phraseology, this court is of the opinion that they are in substance the same and to the same effect.

By the treaty with the Creek Nation, proclaimed August 28, 1856, the Creeks and Seminoles were to be "secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits."

Certain persons were excepted from the provisions of this section and allowed to remain in the Creek and Seminole Nations, but as to all other persons, not being members of either tribe, found within their limits, it was provided:

"Shall be considered intruders and be removed from, and kept out of the same by the United States agents for said tribes respectively, assisted, if necessary, by the military."

By the twelfth article of the treaty, proclaimed August 11, 1866, the United States reaffirmed, and reassumed the obligations of the treaty stipulations with the Creek Nation entered into prior to 1861, except such as were not inconsistent with any of the articles or provisions of that treaty. From these treaty stipulations entered into between the United States and the Creek Nation, it ap-

pears that the Creek Nation was secured in the unrestricted right of self-government and full jurisdiction over persons and property within the limits of the Nation, with certain exceptions which were mentioned, and which it is not now necessary to set forth. This right of self-government was to be exercised, of course, in accordance with the treaties and laws of the United States. The right, however, of the Nation to determine who should be members of the tribe was one of the rights of self-government which Congress conceded to the Nation by solemn treaty obligations.

See pages 523 and 524, Decisions of U. S. Courts I. T. in citizenship cases 1899.

The court below, in its general opinion, announces the following:

“In determining who are citizens of the Muskogee Nation the following propositions will govern this court:

First. Those Indians who have separated themselves from the Creek Nation and have taken up their residence in the States, and have remained out of the jurisdiction of the Muskogee Nation for a period of 21 years, have forfeited all their rights and privileges as citizens of the Nation, and such persons cannot regain their citizenship unless they comply with the laws of the Creek or Muskogee Nation and be admitted to citizenship as therein provided.

Second. This court will recognize the legislation of

the Creek or Muskogee Nation in reference to citizenship therein, and also the legislation creating a commission on citizenship with prescribed powers to pass upon applications for citizenship in said Nation, as passed in accordance with the general legislative power of the Creek or Muskogee Nation; and this court will respect such legislation to the extent that it may be in accordance with the Constitution and laws of the United States and the treaties made between the United States and the Creek or Muskogee Nation.

Third. That blood alone is not the test of citizenship in the Creek or Muskogee Nation. That Creek Indians, although they may be fullbloods, who have remained out of the jurisdiction of the Muskogee Nation for 21 years will be regarded as having forfeited their right to citizenship therein; and further, that bona fide residence in the Nation is essential to citizenship.

Fourth. Full force and credit will be given to the judgments of the Citizenship Commission, and effect will be given to the acts of the Muskogee Council, unless it be made to appear that the Commission acted without jurisdiction or that the judgment was procured by fraud and that acts of the Council were in violation of the laws of the United States or the treaties made with the Nation. The acts of the Muskogee Council in the determination of applications for citizenship in the Nation will be regarded



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as judgments of a court and will be subject to the same tests as to their validity."

Decision et supra pp. 525-526.

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W. T. MORGAN ET AL,

*Appellants,*

VS.

UNITED STATES,

*Appellee.*

No. 454.

The foregoing argument applies with equal force to this case in respect to questions of law.

The difference between the Morgan case and the case of Jennie Johnson, is that the former was tried and determined by the Creek Citizenship Commission. A strenuous effort was made to show that the appellants were denied a fair trial, and that they were treated by the Commission with abuse and contumely. It was a signal failure. The Nation produced the testimony of four of the five judges which show that the charges were absolutely unfounded.

The Morgan case, like the other, was twice referred to special masters, and the widest latitude given for the in-

roduction of testimony upon all questions. The proof in the first place failed to show satisfactorily, that Morgan had any Creek blood in his veins.

The Citizenship Commission in passing upon this case, and commenting upon the testimony produced before them used the following language:

“The evidence failed to trace his relationship by blood to any known Creek family, either remaining in the country east of the Mississippi or emigrating to the country west. \* \* \* ” And further failed to produce any evidence to show that he had ever resided within the jurisdictional limits of the Muskogee Nation to sustain his claim to readmission. The mere fact of his having been enrolled on the census roll of the Arkansas Colored Town by the town King does not constitute a right to citizenship, nor is it considered as making application to the Muskogee Nation for citizenship. Therefore, the Commission is of the opinion and so decides that Wm. T. Morgan and his children are not entitled to citizenship in the Muskogee Nation.” Tr. pages 6 and 7.

The appellant endeavored to prove that his grandfather had lived and died in the Creek Nation west of the Mississippi. The testimony offered was insufficient to establish his blood to the satisfaction of the Creek Citizenship Commission, and to the United States court for the Northern District of the Indian Territory. The testimony

shows that Wm. T. Morgan, the appellant, was born in Tennessee; and there is no testimony except his own that he was ever in the Indian Territory at all until 1863, when he was stationed at Fort Gibson as a soldier in the 14th Kansas. After that he and his father went to the state of Arkansas where he was recognized as a citizen and held the office of County Judge, and in 1888, or 1889, he went the Creek Nation and procured himself to be enrolled upon the roll of the Arkansas Colored Town, and that he was never recognized as a citizen at any of the payments, or annuities paid to the Creek Indians.

The counsel for the appellants, page 10 of his brief, says "that the testimony of the appellant, if it stood alone would be sufficient to convince any impartial person of his Creek blood."

It is unfortunate for the appellants that his testimony does not stand alone. His supporters are Gabriel Jamison, Samuel Barnet, Phillip Caesar, Monday Hardridge and R. C. Childers, none of whom are Creek Indians by blood. All of them except R. C. Childers are admitted to be negroes, and Childers claims that he is white and Cherokee; and their testimony when analyzed will have no weight. It is somewhat strange that a man of Judge Morgan's prominence was unable to prove his Creek blood by a citizen by blood of the nation to which he alleges he and his father and grand-father belonged and

in which they had lived for several years; and it is more strange that when he returned to the nation he should have himself enrolled in a negro town, instead of in the Coweta Town to which he claims to belong.

The Cowetas are distinguished in their history as warriors, and friends to United States and furnished to the Nation some of its most eminent Chiefs, among others, Gen. William McIntosh, the friend and fellow soldier of Gen. Jackson; and Chilly McIntosh, who negotiated the treaty of 1834, above referred to, under which the Creek Indians acquired title to their present territory.

R. C. Childers, whose testimony as taken on the first day of January, 1897, said he was 74 years of age, a Cherokee Indian by blood, and a Creek Indian by adoption; and that he took the census of Coweta Town in 1840 or 1841, and that he enrolled the names of Hugh Morgan and John Morgan, and that they were Creek Indians by blood. If he tells the truth about his age, he was in 1840 only 17 years old, and at that time was not a citizen of the Creek Nation, and he was not adopted as a citizen until 1867, as is shown on page 102, Sec. 294 of McKellop's Digest. It is extremely doubtful, if not incredible, this statement that he took the census when he was so young and not even a citizen of the Creek Nation, and it is doubtful whether he was even a resident of the Creek Nation at that time.

The counsel for appellants points with pride to the endorsement of R. C. Childers by *L. C. Perryman, once Principal Chief*, who gives Robert a very good character, but the ex-Chief has no one to vouch for *his character*.

On the contrary, on page 67 of the printed record is the record of his impeachment by the House of Kings, upon charges preferred by the House of Warriors against him for his misconduct as Principal Chief, and for which he was removed from office; which under the Creek laws renders him incompetent as a witness. This, I think, is a good set off to the record of the conviction of Wiley Sukey in the United States court.

The testimony of W. T. Morgan in regard to the proceedings of the Citizenship Commission in the trial of his case is contradicted by James Colbert, the president of the Commission, Daniel Gooden, David Cummings, William Peters, Associate Judges, and Sue M. Rogers, principal clerk of the Commission, whose testimony is found on pages 52, 55, 60, 62, 63, 65, printed record. On pages 66 and 68 it is shown that W. T. Morgan, May 17, 1895, took out a license from the United States to trade with the Creek tribe of Indians, which would have been unnecessary if he at that time had been recognized or known as an Indian by blood.

As before stated the weakness of the appellants case is, that his testimony does not stand alone. The testimony

of his alleged corroborating witnesses does not corroborate.

The limited time allowed for the preparation of the brief precludes a further analysis of the testimony. The opinion of the learned Judge of the United States court for the Northern District of the Indian Territory who tried the case, reviews the testimony perfectly, and cites the laws of the Creek Nation to which reference is made. The court concludes as follows: "The examination of the testimony before the Commission, and also the opinion of the Commission clearly establishes the fact that the Commission acted within the scope of its authority, declares the fact that no error was committed." The Creek Nation confidently believes that this court, upon the examination of the testimony, will concur in the opinion of the Judge of the court below; that the testimony adduced by the appellants fails to establish that he is a citizen of the Creek Nation by blood, and the Creek Nation insists that if he were a member of the Creek tribe of Indians by blood, it appears that he was born outside of the Indian Territory, became a citizen and held office in the state of Arkansas, and remained absent more than 21 years without making an application in good faith to be readmitted, and is therefore excluded by the provisions of the Alien Act approved Oct. 26, 1889.

The counsel for the Creek Nation filed exceptions to

the Master's report, which are omitted from the transcript of the record; and the testimony of John McIntosh which was material, is also omitted.

There are other cases which have been appealed to this court and the counsel for the Creek Nation has not been furnished with a printed copy of the record, nor the briefs of the appellants, and if this court should take jurisdiction to try the cases upon the merits, it would be just that the counsel for the Nation should be furnished with copies of the record and briefs so that he may present the Nation's side of the cases.

BEN T. DuVAL,  
Attorney for the Muskogee Nation.

# THE SUPREME COURT OF THE UNITED STATES.

No. 496.

OCTOBER TERM, 1898.

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THE CHICKASAW NATION, APPELLANT,

VS.

RICHARD C. WIGGS, ET AL.

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Appeal from the United States Court in the Indian Territory.

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## Motion to Advance.

The Act of July 1, 1898, authorizing the appeal of this cause, contains the following provision :

“In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket, and dispose of the same as early as possible.”

The appellant moves the Court to advance said cause for hearing at as early a day of the present term as the convenience of the Court may permit.

HALBERT E. PAINE,

Attorney for Chickasaw Nation.

The questions involved in this cause are also involved in causes Nos. 469 to 536, inclusive, in all of which, except No. 527, the Chickasaw Nation is appellant. The undersigned is attorney for the Chickasaw Nation in all of said cases, which include all the Chickasaw citizenship cases appealed to the Supreme Court. The claimant moves that a similar order of advancement be made in each of said causes.

HALBERT E. PAINE,

Attorney for Chickasaw Nation.

Service of notice of above motion admitted this

..... February, 1899.



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Case No. 496.

FEB 18 1899

JAMES H. MCKENNEY,  
Clerk

IN THE

Supreme Court of the United States.  
*Ex. of Paine for App. (and*

*Chickasaw Nation*  
THE UNITED STATES,

APPELLANT.

*Filed Feb. 18, 1899.* No. 496.

RICHARD C. WIGGS ET AL.

Appeal from the District Court in the Chickasaw Nation.

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,  
*Atty for Appellant.*

WASHINGTON, D. C.  
GIBSON BROS., PRINTERS AND BOOKBINDERS.  
1899.



# Supreme Court of the United States.

OCTOBER TERM, 1898.

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No. 496.

*Chickasaw Nation*  
THE UNITED STATES, APPELLANT,

v.

RICHARD C. WIGGS ET. AL.

---

*Appeal from the District Court in the Chickasaw Nation.*

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**Motion to Dismiss Appeal.**

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## **BRIEF FOR APPELLANT.**

HALBERT E. PAINE,  
*Atty. for Chickasaw Nation.*

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If this motion shall prevail, all the Chickasaw appeals, sixty-eight in number, will be dismissed, and also all the appeals from the Cherokee, Choctaw, Creek, and Seminole nations. The result will be to enroll thousands of white persons as citizens of those nations and to deprive the nations of from one to two millions of acres of their lands and of a considerable part of their large trust funds

now held by the United States. The importance of this proceeding, therefore, demands a careful examination of the questions involved in the motion.

# I.

The judgments rendered in this case by the "Commission to the Five Civilized Tribes," known as the Dawes Commission, and by the district court in the Chickasaw nation were both void for want of jurisdiction.

All the powers possessed by the United States, except such as may have been acquired by treaties with other nations, are inherent powers of sovereignty, recognized and secured by the law of nations. Many of them are enumerated, regulated, and distributed among the different departments of the government, by the constitution; but none are derived from it. The constitution is the creature, not the creator, of the sovereign state. I will assume, for the purposes of the argument merely, that these inherent powers include the power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations; and that the possession of this power results from the paramount dominion held by the United States over all the territories within the exterior boundaries of the nation. But this power, if vested in the United States, is not included among those distributed, by the constitution, among the three departments of the government; nor is its exercise "necessary and proper" for carrying into execution any of those powers. It is included among the "reserved powers." Its exercise has never been intrusted to congress, or to any other department of the government. It is reserved, not to the states, but to the people.

The constitutional provision that, "congress shall have

power to regulate commerce with the Indian tribes," does not confer upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations. This will be plainly apparent, when we examine the text of the constitution, and consider the relations which, at the time of its adoption, existed between the United States and those nations. The following are the words of the constitution :

The congress shall have power,—3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Looking at the words alone, we see, at once, that the regulation of commerce with foreign nations, or among the several states, or with the Indian tribes, has no possible connection with the determination of questions of citizenship in foreign nations, or in the states, or in the Indian tribes. We see, too, that, if these words were effectual to authorize congress to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, they would also authorize congress to invest such tribunals with jurisdiction to determine who are citizens of the several states and of foreign nations.

The reason why foreign nations and the Indian tribes are placed in the same category, in this clause of the constitution, is readily found. At the time of the adoption of the federal constitution, the relations between the United States and the Indian nations were acknowledged, by the United States, to be relations between treaty-making powers. Treaties were made between Great Britain and the Chickasaws and Choctaws, during the colonial period ; and twenty-three treaties have, from time to time, been made with those nations, by the United States. They were regarded by the United States as *nations*,—not, indeed, as nations wholly independent of the United States,—

but as nations capable of making treaties with the United States. Their relations to the United States, at the time of the adoption of the constitution, as acknowledged by the United States, have been accurately defined in the opinions of the supreme court. In *Worcester v. Georgia*, 6 Pet. 515, 547, 557, 559, Chief Justice Marshall, delivering the opinion of the court, said :

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take ; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies ; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only. \* \*

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians ; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged, but guaranteed, by the United States. \* \*

The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected, in our diplomatic and legislative proceedings, by ourselves, each having a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

In *Cherokee Nation v. Georgia*, 5 Pet. 1, 15, Chief Justice Marshall said :

They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

We have, then, no difficulty in understanding why the power to regulate commerce with the Indian tribes and the power to regulate commerce with foreign nations were placed on the same footing, in this paragraph of the constitution. It becomes clear, too, that the apparent effect of this clause is its real effect. It becomes clear that, if this provision empowers congress to invest tribunals, of its own creation, like the Dawes Commission, or the Chickasaw district court, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, it also confers upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of France and of Mexico, and who are British, German, or Russian subjects.

This would be all different if the constitution had invested congress with power, over the Chickasaw and Choctaw nations, broad enough, in scope, to include the regulation of their citizenship, as well as of their commerce with the United States. For then the principle established by the supreme court, in the case of *The American Ins. Co. v. Canter*, 1 Pet. 513, soon to be considered, would have been applicable to this case. Then it would have become competent for congress to invade the Choctaw and Chickasaw nations, and to do there what it could not do in one of the states,—that is to say,—to invest with judicial powers a tribunal, whose judges did not hold office during good behavior,—a mere “legislative court,” not a component part of the constitutional judiciary of the United States. Then the power to invest the Dawes Commission, and the district courts in the Chickasaw nation, with jurisdiction of these citizenship cases, would have been “necessary and proper for carrying into execution” a power expressly conferred upon congress, by the constitution.



In *American Ins. Co. v. Canter*, 1 Pet. 513, 546, Chief Justice Marshall, delivering the opinion of the court, said :

It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish." Hence it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior court of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government, or in virtue of that clause, which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction, with which they are invested, is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress, in the execution of those general powers, which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised, in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

In this case of *The American Ins. Co. v. Canter*, the necessary power over the territories having been conferred upon congress, by the constitution, the question was, whether it was competent for congress to employ, in the execution of that power, a court, which was not a constitutional court, but to use the words of the chief justice, was a mere "legislative court." That question was decided in the affirmative. And if the constitution had conferred upon congress power over the Chickasaw and Choctaw nations, as broad as that conferred upon congress over the territories, the principles established in that case would uphold the jurisdiction of the Dawes Commission and of the Chickasaw district court, in these citizenship

cases. But the constitution has not conferred on congress such power over the Chickasaw and Choctaw nations.

The power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, has not been entrusted expressly or by implication to any department of the government of the United States. It is reserved to the people; and, until the people shall, by constitutional amendment, or otherwise, confer that power upon congress, it cannot be exercised by congress. It follows that, the judgments of the Dawes Commission and of the district court are void, for want of jurisdiction.

Is it contended that, congress has acquired the power to invest tribunals, of its own creation, with jurisdiction of these citizenship cases through treaties with the Chickasaws and Choctaws? The answer to this claim is four-fold. No treaty, between the United States and the Chickasaws or Choctaws, confers, or purports to confer, any such power. But if a treaty conferred this power upon the *United States*, it would, for reasons already explained, be incompetent for congress to exercise the power, without authority from the people, granted by an amendment of the constitution, or otherwise. If a treaty purported to confer this power upon *congress* specifically, it would not be competent for congress to exercise the power, without authority from the people. But then, the Chickasaw nation cannot, by stipulation, confer upon the congress, or the courts, of the United States, powers, or jurisdiction, interdicted by the constitution. The constitution of the United States cannot be altered by a treaty with the Chickasaw nation, any more than by an act of the Chickasaw legislature.

## II.

For the purposes of the argument, I assume, for the present, that it was competent for congress to invest the

"district court," for the Chickasaw nation, with appellate jurisdiction of these citizenship cases. That being assumed, I submit that it was also competent for congress to enact the statutory provision of June 28, 1898, authorizing appeals in these cases from that court to the supreme court. The power to authorize appeals is not a judicial power. It is a legislative power. The exercise of this power is a legislative, and not a judicial act. Courts can neither authorize nor prohibit appeals, nor prescribe the time or manner of taking them. All they can do is to decide whether the appellant complies with the terms prescribed by the law. The right of appeal is independent of judicial discretion. If the party has done all that the statute requires to entitle him to his appeal, and its allowance is refused, a mandamus lies to compel the allowance. *United States v. Gomez*, 3 Wall. 72; *United States v. Adams*, 6 Wall. 101.

If the law in force, at the date of the judgment, permit an appeal, within a limited period, and the unsuccessful party fail to appeal, within the time prescribed, he may justly be held to have waived his right of appeal. But congress is competent to authorize an appeal, after judgment even by a constitutional court, in the absence of antecedent authority for an appeal.

In 1836 an inquisition by a jury, condemning certain lands for a railway company, was ratified and confirmed by a court of competent jurisdiction. Five years afterwards, in 1841, the legislature of the state passed an act directing the court to set aside the inquisition, and cause a new inquisition to be made. The court thereupon made an order setting aside the inquisition. The case was taken, by writ of error, to the supreme court of the United States, under section 25 of the judiciary act. The railway company contended that the act of 1841 was

unconstitutional and void. But the supreme court, in *Railway Co. v. Nesbitt*, 10 How. 395, held the act to be valid, and said :

This intervention was simply the award of a new trial of the proceedings under the inquisition, which proceedings were of no avail as a judgment, after such new trial was allowed. This intervention too was the exercise of power, by the legislature, supposed, by that body, to belong legitimately to itself ; whether this authority was strictly legislative, or judicial, according to the distribution of power in the state government, was a question rather for that government than for this court to determine.

In *Calder v. Bull*, 3 Dall. 386, the legislature of Connecticut had set aside a decree of an inferior court, and granted a new trial in the same court, with right of appeal to the supreme court of the state. The supreme court of the United States held that there was, in the constitution of Connecticut, no line of demarcation, which excluded the legislature from the performance of judicial acts, and that the law setting aside the decree and directing a new trial was valid. The principle established by this decision of the supreme court is that, the incompetence of the legislature to grant even new trials, results, not from any general principles of jurisprudence, but from constitutional provisions expressly or by implication separating the legislative from the judicial department of the government. But if, in the absence of a constitutional provision separating the legislative from the judicial powers of the government, it is competent for the legislature to exercise the power of granting a new trial, which is unquestionably a judicial power, then *a fortiori* must it be competent for the legislature, under such a constitution, to exercise the legislative power of authorizing an appeal.

Now, although the constitution permits no United States court to exercise judicial powers within a state, unless its judge holds his office during good behavior, the supreme court in *American Ins. Co. v. Canter*, 1 Pet. 515,

546, cited above, holds that it is competent for congress to confer judicial powers upon territorial courts, whose judges hold office only for limited periods. But it is not between such courts and the legislature, that the line of separation, between the legislative and judicial departments and powers of the government, is drawn, in the federal constitution. That line is drawn between the legislature and the constitutional judiciary; not between the legislature and mere legislative courts, or tribunals. The decisions in *Calder v. Bull* and *American Ins. Co. v. Canter*, then, taken together, not only make it lawful for congress to exercise the legislative power of authorizing appeals in these cases, but even go so far as to make it lawful for congress to exercise the judicial power of granting new trials. The question, whether congress properly authorized these appeals, is, under the decisions just cited, not a question of constitutional power or of legal competence, but wholly a question of justice and public policy.

In *Sampeyreac v. United States*, 7 Pet. 234, one of the questions was, whether it was competent for congress, by an act passed May 8, 1830, to authorize a review, by the same court, of a decree rendered at the December term, 1827, it appearing that Sampeyreac was a fictitious person. That question was decided in the affirmative. The court said :

*If Sampeyreac was a real person, and appeared here setting up this objection, it might present a different question ; although it is not admitted, even in that case, that the United States would be concluded as to the right.*

Another question was whether the act of May 8, 1830, by retrospective operation, gave the court jurisdiction of a bill of review filed in April, 1830. This question also was decided in the affirmative. The court said :

*It is said that if this bill of review was filed under the act of 1830, the court had no jurisdiction, the bill having been filed in April, and the law*

not passed until the May following. But the act in terms applies to bills filed, or to be filed, and of course cures the defect if any existed. Such retrospective effect is no uncommon course. The act of 1803, amending the judicial system of the United States, 3 Laws U. S. 560, declares that from all final judgments or decrees, rendered or to be rendered, in any circuit court, &c., an appeal shall be allowed to the supreme court.

In *Converse v. Burrows*, 2 Minn. 191, the court said :

A preliminary objection was taken on the argument, by the counsel of the respondents, that this was not an appealable case, as the act providing for an appeal from an order granting a new trial, was passed after the allowance of the order in the case at bar. The provision, under which this appeal is brought, is found in the amendments of Rev. Stat. by Sess. Laws of 1856, p. 13, ch. 5. The object of the act is evidently to extend the right of appeal beyond what previously existed. It is a remedial law and should receive a liberal construction. It provides a remedy in a case where otherwise injustice might be done, and should be given effect, in all cases where proceedings have not been had to such an extent as to exclude its application. Statutes of this nature may be construed *ultra* but not *contra*, the strict letter, (1 Kent, 465) and the doctrine that statutes, retrospective in their effect, are unconstitutional is held not to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb vested rights (1 Kent, 455.) We cannot perceive how the act giving the right of appeal, in this case, impairs, in any manner, the contract between the parties, or affects any vested right of the defendants. The same reasoning as in the case of *Grimes v. Bryne* (argued at the present term) here applies, and the objection cannot be sustained.

In *Ex parte Bibb*, 44 Ala. 140, the court said :

There certainly cannot now be any doubts as to the power of the legislative department of the government to pass a law authorizing the opening of judgments and the grant of new trials. This has been an authority uniformly exercised, by the government of this state, from its commencement, and has never, so far as I know, been seriously questioned.

In *Prout v. Berry*, 2 Gill, 147, an act of the legislature granting an appeal, in a particular case, after the expiration of the time for appeal limited by the general law, was held to be valid. In *State v. Railway*, 18 Md. 193, it was held that, the legislature may, after judgment, pass an act authorizing an appeal, in a case where, by the general law, no appeal could lie.

In *Jackson v. Lamphire*, 3 Pet. 280, 290, the court said :

It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time ; and the power is

the same whether the deed is dated before, or after, the passage of the recording act.

This opinion was quoted and adopted in *Curtis v. Whitney*, 13 Wall. 68.

In *Chadwick v. Moore*, 8 Watts and Searg. 49, it was held that an act, which suspended, for a reasonable time, the execution of a judgment on a previous contract, was not prohibited by the tenth section of the first article of the constitution of the United States, and that, therefore, the statute enacted by the legislature of Pennsylvania in 1842, suspending, for a year, a sale, on execution, for less than two-thirds of the appraised value, was not unconstitutional in respect of its retrospective operation. In *Mason v. Haile*, 12 Wheat. 370, the supreme court held the following resolutions, adopted in 1815 and 1816, respectively, by the legislature of Rhode Island, to be valid :

On the petition of Nathan Haile, praying, for the reasons stated, that the benefit of an act entitled, "An act for the relief of insolvent debtors," passed in the year 1756, be extended to him, voted that said petition be continued till the next session of this assembly, and that, in the meantime, all proceedings against him, the said Haile, on account of his debts, be stayed; and that the said Haile be liberated from his present confinement in the jail, in the county of Providence, on his giving sufficient bond to the sheriff of said county, conditioned to return to jail in case said petition is not granted.

On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that the benefit of an act passed in June, 1756, for the relief of insolvent debtors, may be extended to him; voted that the prayer of the petition be and the same is hereby granted

In *Goshen v. Stonington*, 4 Conn. 209, it was held that, an act, declaring all marriages previously celebrated, in that state, by a minister ordained and empowered to celebrate marriages according to the forms and usages of any religious society or denomination, to be valid, was not void by reason of repugnancy to the constitution of that state, or to the constitution of the United States; that it was not void for the reason that it might, in its operation, impair vested rights; that its retrospective

operation was not to be limited, by construction, to the parties to the marriage and their issue; that the circumstance that a law was explicitly retrospective, and might affect the rights of individuals, did not authorize the judiciary to declare it void, if it were just and reasonable and conducive to the general good.

In *Savings Bank v. Allen*, 28 Conn. 97, 102, the court, referring to and approving the case of *Goshen v. Stonington*, said:

The principle adopted was, in substance, that, when a statute is expressly retroactive and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right, and of public policy affecting the peace and welfare of the community, the law should be sustained.

In *Schenley v. Commonwealth*, 36 Penn. St. 29, 57, Mr. Justice Strong, delivering the opinion of the court, said:

In *Hepburn v. Curts*, 7 Watts, 300, it was said, "the legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.

In *Doe v. Lambert*, 1 Green's Law Rep. 182, the supreme court of New Jersey decided that a deed, made by the commissioners, in partition proceedings, to any other person than the one reported as purchaser, was void. Thereupon the heirs instituted actions of ejectment, in the circuit court of the United States, in order to recover the property. The grantees then applied to the legislature for relief, and an act was passed validating the conveyance. In *Kearney et al. v. Taylor et al.*, 15 How. 494, the supreme court held this act to be valid.

In only five of the cases, cited by the appellee, was it held to be incompetent for the legislature to authorize an appeal, after the rendition of judgment; and in those five



cases, the acts granting the appeals were special acts, applicable only to single cases. Three of them arose under peculiar statutes, under which an appeal was *per se* a supersedeas, and vacated the judgment; and two were decided, without reasoning, on the authority of two others of the five cases. Moreover every case cited, including these five, was a case in which the judgment appealed from had been rendered by a court constituting a part of a constitutional system of judicature, and not by a mere legislative court created by law, outside the constitutional judiciary of the state. The cases were *Bates v. Kimball*, 2 Chip. (Vt.) 77; *Standiford v. Barry*, 1 Aik. 314; *Lewis v. Webb*, 3 Greenl. 326; *Durham v. Lewiston*, 4 Greenl. 140; *Hill v. Sunderland*, 3 Vt. 507.

In *Bates v. Kimball*, 2 Chip. (Vt. 1824) the defendant having neglected to appeal within the time limited by the general law, the legislature authorized an appeal by a special act. The court held that the appeal vacated the judgment, and that the granting of the appeal, by the legislature, was therefore a judicial act. This decision was predicated upon a peculiarity of the Vermont law then in force, which made the appeal *per se* a supersedeas, suspending execution "until after the trial had upon the appeal, or review." There was only one kind of appeal. Compiled Laws of Vt. The statute of the United States makes two kinds of appeals, one suspending, the other not suspending execution. Rev. Stat. sec. 1000. A mere appeal does not *per se* vacate the judgment. It does not *per se* even suspend, or stay, the execution of the judgment. It is the supersedeas, and not the mere appeal, that suspends the execution of the judgment. The only effect of the appeal, unaccompanied by the supersedeas, is to place the cause on the course, which every cause of great moment ought to take, in a well

ordered judicial system,—that is to say, on the way to a final determination by the court of last resort. The act of congress, authorizing appeals in these citizenship cases, did not make the appeal a supersedeas. It did not vacate the judgment. An abandonment of this appeal, by the appellant, or a dismissal of the appeal would leave the enrollment by the district court in force. No new enrollment, by that court, would be necessary. The appeal only placed the cause in the proper channel for reaching a final judgment in the supreme court.

The case of *Standiford v. Barry*, 1 Aik. 314, in which an appeal was authorized by a special act of the Vermont legislature, after the time for appeal limited by the general law had expired, was decided on the authority of *Bates v. Kimball*, with no reasoning on the part of the court. In *Lewis v. Webb*, 3 Greenl. 326, the legislature having, by a special act, authorized an appeal five years after the rendition of the decree, the court held that the granting of the appeal was a judicial act, and was unconstitutional. In *Dunham v. Lewiston*, 4 Greenl. 140, the legislature of Maine had, by a special act, authorized a review of the case. The court, upon the authority of *Lewis v. Webb*, held the act unconstitutional. In *Hill v. Sunderland*, 3 Vt. 507, a statute authorizing an appeal by the town, but not by the opposite party, from a decision of the road commissioners made before the enactment of the statute, is held to be unconstitutional, "as respects the damages and costs awarded to individuals." The peculiarity of the Vermont statute has already been explained.

In the six following authorities cited by the appellee, the question was whether the legislature could set aside a judgment and grant a new trial. No such question is involved in the motion now under consideration. In *Young v. State Bank*, 4 Ind. 301, the court held as follows :

Now the constitution, above quoted, says the legislature shall not perform a judicial act. The granting of a new trial, we have seen, is a judicial act. Therefore the legislature can not grant a new trial.

In *Taylor v. Place*, 4 R. I. 324, a resolution of the legislature, opening certain judgments of the court of common pleas, in order to admit amended pleadings and affidavits, was held to be unconstitutional. In *Davis v. Menasha*, 21 Wis. 491, a statute requiring every court of the state, upon the application of either party, to vacate and set aside judgments rendered within three years prior to the passage of the act, and to grant new trials, was held to be void. In *De Chastellux v. Fairchild*, 15 Penna. St. 18, the supreme court having rendered a final judgment, the legislature granted a new trial in the court of common pleas. The court held that the power exercised was judicial, and could not be exercised by the legislature. In *Atkinson v. Dunlop*, 50 Me. 111, an act authorizing a review, by the court which rendered the judgment, after the time for review fixed by the general law had expired, was held to be invalid. Section 298 volume 1 of Black on judgments relates not to appeals but only to the vacation of judgments. In *Martin v. South Salem Land Co.*, 26 Southeastern, 591, one of the questions was whether an act, prescribing the mode of recovering certain subscriptions, applied to a case in which judgment had been rendered and an appeal taken prior to the passage of the act, thereby necessitating a new trial. The court said:

It has been uniformly held that the legislature has no power to grant a new trial, or to direct a rehearing, in a cause which has been once judicially settled, and that every such attempt is plainly an invasion of judicial power, and is therefore unconstitutional and void.

The other cases cited by counsel for the appellee have no appreciable weight as authorities in support of the motion. This will appear upon an analysis of those

cases. The question in *Pennsylvania v. Bridge Co.*, 18 How. 421, was, not whether congress could grant an appeal to the supreme court, from a judgment previously rendered by an inferior court, but whether congress could annul a decree of the supreme court of the United States. In *McCabe v. Emerson*, 18 Penna. St. 111, the question was whether, after a cause had been adjudicated by the supreme court, on writ of error brought by one party, the other party could bring his writ of error and secure a second adjudication of the same cause by the supreme court. It was held that, if the statute, under consideration, purported to authorize such a proceeding, it was void. In *Dash v. Van Kleck*, 7 Johns. 477, the question was whether an act of the New York legislature could bar a suit brought against a sheriff before the passage of the act, for the previous escape of a prisoner. The court decided that the act could not have that effect.

The ruling in *Skinner v. Holt*, 69 Northwestern, 595, was merely to the effect that, after the rendition of a judgment making the proceeds of a life policy assets of an estate, it was not competent for the legislature to make the same the property of the widow and child. In *Saltus v. Tobias*, 3 Paige, 338, one of the questions was whether a declaratory act could deprive an individual of a vested right, or change the rule of construction of a pre-existing law. The question whether it was competent for the legislature to grant an appeal from a judgment previously rendered, was not involved in the case.

The legislature of Virginia on the 25th of March, 1873, enacted a law which provides that, if a judgment or decree of the class described shall remain unpaid,

It shall be lawful for the courts, in a summary way, on motion, after ten days' notice, either before or after the issue of execution, to fix, settle and direct at what depreciation, or how, the said judgment or decree shall be discharged, having regard to the provisions of this act,

to the cause of action for which the judgment or decree was recovered, and any other proof, or circumstance, that, from the nature of the case, may be admissible.

In *Ratcliffe v. Anderson*, 31 Gratt. 105, this provision was held to be void.

No authority has been cited for the position that congress cannot, after the rendition of a judgment by a legislative court not organized under the constitution, authorize an appeal to the supreme court of the United States. But the judgment of the supreme court, in the case of *Sampeyreac v. United States*, in which a special act authorizing an appeal from a territorial court was held to be valid, is adverse to that position. The authorities which I have cited, relating to appeals from constitutional courts, are *a fortiori* applicable to appeals from legislative courts, and, therefore, adverse to the contention of the appellees.

The question whether it was competent for congress to authorize an appeal, from the district court in the Chickasaw nation, to the supreme court of the United States, is, in its constitutional aspects, very different from the question, whether congress can authorize an appeal, from a circuit court of the United States, to the supreme court. The circuit court is a component part of one of the three co-ordinate branches of the government of the United States. These three departments are separated by sharply drawn lines of demarcation. All the judicial powers of the United States, conferred or recognized by the constitution, are vested in United States courts, whose judges hold their offices during good behavior. None of those powers can be exercised by the judge of the Chickasaw district court, who holds his office only for a limited term. That court is a mere legislative court, like the territorial court so characterized by Chief Justice Mar-

shall, in *American Ins. Co. v. Canter*. It is the creature of the legislature.

It does not stand on the footing of a constitutional court. It is not completely invested with the powers or rights of courts organized under the constitution. It is not a part of the judiciary, which constitutes one of the three departments of the federal government. Its relations to congress are not identical with those of courts organized under the constitution. It would be a mistake to characterize the regulation of such a court, by congress, as an invasion of the judicial department of the government by the legislature ; for it has no place in the judicial department of the government. Its jurisdictional power, in these citizenship cases, is not to be found among the judicial powers specified in the constitution. It is only a part of the machinery devised by congress for the performance of duties involved in an attempted execution of the power to regulate commerce with the Indian tribes and of some inherent power of sovereignty not specified in the constitution.

If it were a rule of the unwritten law of the United States that, congress could not, by a law enacted after the rendition of a judgment by one of the inferior courts authorized by the constitution, provide for an appeal to the supreme court, that rule would not necessarily be applicable to a court created by congress for the Indian Territory. The constitutional barrier, which separates congress from the federal judiciary, does not separate congress from that court. The regulation of its functions and methods is nothing else than the legitimate control of the creature by the creator, provided such regulation is not inconsistent with the fundamental principles of the government. If there is any question as to the propriety of such regulation in a particular case, it would seem to be not a con-

stitutional or legal question, but rather a question of justice and public policy. The subjection of such vast interests, as are involved in these citizenship cases, to the final determination of a single judge of a legislative court, confirming the reports of a master and overruling the judgments of a tribunal including four able lawyers, with no right of appeal to the supreme court, is so abhorrent to justice as to exclude the application of any possible rule of a constitutional system of judicature, which would negative the right of congress to authorize an appeal, unless its application is absolutely required by the principles on which our government rests.

### III.

It is contended that vested property rights to lands and moneys of the Chickasaw nation, acquired through the judgments of the district court, will be destroyed or impaired, if this appeal shall not be dismissed. That is a mistake. The appellees have not, through that judgment, or otherwise, acquired, nor do they possess, any vested property rights in either lands, or moneys, of the Chickasaw nation. The lands, held in common by the Chickasaw and Choctaw nations, are the public property of those nations. The individual Chickasaws and Choctaws are not, as counsel asserts, tenants in common of those lands, nor do they hold those lands in any other form of individual ownership. Nor do the citizens of those nations hold, as individuals, the public moneys of the respective nations. The relation of the citizens of the Chickasaw and Choctaw nations to those lands and moneys, is, so far as this point is concerned, practically the same as the relation of the citizens of the United States to the public lands, and to the public moneys in the treasury of the

United States. All the citizens of the United States are equally interested in the public lands and moneys ; but none of them hold any individual ownership therein. Those lands and moneys are public property of the nation,—not in any sense, nor for any purpose, private property of the citizens. Precisely the same thing is true of the relation of the citizens of the Chickasaw and Choctaw nations to the lands and moneys of those nations. That relation is easily ascertained. The Choctaw treaty of October 18, 1820, contains the following clause :

ART. 2. For and in consideration of the foregoing cession on the part of the Choctaw *nation*, and in part satisfaction for the same, the commissioners of the United States, in behalf of said states, do hereby cede to said *nation* a tract of country west of the Mississippi river, situate between the Arkansas and Red river, bounded as follows : &c.

The act of May 28, 1830, contains the following provision :

SEC. 3. *And be it further enacted*, That in the making of any such exchange, or exchanges, it shall and may be lawful for the president solemnly to assure the *tribe*, or *nation*, with which the exchange was made, that the United States will forever secure and guaranty to them and their heirs and successors the country so exchanged with them ; and, if they prefer it, the United States will cause a patent, or grant, to be made and executed to them, for the same. *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

The treaty of September 20, 1830, contains the following stipulation :

ART. 2. The United States, under a grant specially to be made by the president of the United States, shall cause to be conveyed to the Choctaw *nation* a tract of country, west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation, and live on it, &c.

The patent granted by the president March 23, 1842, contains the following clause :

Know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw *nation*, the aforesaid tract of country, &c.

By the convention and agreement of January 17, 1837,



the Chickasaw *nation*, purchased from the Choctaw *nation*, a part of the land acquired from the United States, by the above-mentioned treaties and patent. The following is the stipulation :

Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district, within the limits of their country, *to be held on the same terms that the Choctaws now hold it*, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw nation ; &c.

The tract sold to the Chickasaws was carved out of the middle portion of the Choctaw country. It contains 4,650,935 acres. There remained to the Choctaws a tract of 6,668,000 acres east of the "Chickasaw district," and a tract of 7,713,239 acres west of that district, these two Choctaw tracts amounting, in the aggregate, to 14,381,239 acres. The three tracts, amounted, in the aggregate to 19,032,174 acres. The Chickasaw tract was sold to the Chickasaw *nation*, not, as private property, by individual Choctaws, but, as public property, by the Choctaw nation. The effect of the sale was to make the Chickasaw nation the owner of the land sold.

In 1855, the authorities of the United States found it desirable to obtain a lease of the Choctaw tract of 7,713,239 acres, west of the Chickasaw district, for the settlement of certain tribes of friendly Indians. But the lease of that tract would leave to the Choctaw nation only the tract east of the Chickasaw district. The result would be that, although the population of the Choctaw nation bore to the population of the Chickasaw nation the proportion of 3 to 1, and the proportion of the Choctaw to the Chickasaw land, before the lease of 1855, was that of  $14\frac{38}{100}$  to  $4\frac{65}{100}$ , or approximately 3 to 1, the lease of the western tract would leave the proportion of the Choctaw to the Chickasaw land that of 3 to 2. To ob-

viate this manifest injustice, by securing to the Choctaw nation its due proportion, of 3 to 1, in the lands not leased, the treaty of June 22, 1855, transformed the separate ownership of the two nations, in the three tracts, into ownership in common, and leased the western tract to the United States. The following is the language of the treaty of 1855 :

And, pursuant to an act of congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole : Provided, however, no part thereof shall ever be sold, without the consent of both tribes ; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

The result of these arrangements was to make the two nations owners in common of their whole territory, in the proportion which the population of one bore to that of the other.

The interests of Chickasaw citizens, in these lands, are widely different from the rights of tenants in common, in their lands. The tenant in common can convey, mortgage or devise his property rights in the land. The Chickasaw can do neither of these things. The tenant in common can have partition ; the Chickasaw cannot. At the death of the tenant in common, leaving children, his estate does not escheat ; it descends. At the death of the Chickasaw, leaving, or not leaving children, his interest in the lands of the nation does not descend ; it merges in the common stock and escheats. It is, in this respect, like the estate of the citizen of the United States in the public lands. A deed executed by all the tenants in common, conveys their land. A deed of Chickasaw land executed by every Chickasaw, conveys nothing. If a tenant in common dies, leaving, say, five children, the interests of the five children are not, in the aggregate, five times the father's ; they are

only equal to the father's. But if a Chickasaw has five children, their interests, whether he lives or dies, are, in the aggregate, five times as large as his own.

The contention that the act of congress, authorizing these appeals, destroys, or impairs, vested rights of citizens *by blood*, is based upon the following paragraph of article 1 of the treaty of June 22, 1855 :

And pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guaranty the lands, embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common ; so that each and every member of either tribe shall have an equal undivided interest in the whole.

The claim that the law, authorizing these appeals, disturbs vested rights of citizens *by marriage or adoption*, is based upon the same stipulation, coupled with article 38 of the treaty of April 28, 1866, of which the following is the text :

Every white person who, having married a Choctaw or Chickasaw resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the laws of the Chickasaw and Choctaw nation, according to his domicile, and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.

The case of citizens *by blood* is to be considered first. If these words, "so that every member of either tribe shall have an equal undivided interest in the whole," were applied to persons who, under treaties, constitutions, or laws, were permitted to convey, mortgage and devise their estates in lands,—whose children could take their lands by inheritance, but, during the life of the father, acquired no vested interest in lands held by him as tenant in common,—in that case these words, if disconnected with other treaty stipulations and unexplained by the context, might be construed to imply that such persons were to be invested with rights of private property in the land. But,

inasmuch as they are in fact applied to persons who cannot transfer, mortgage, or devise, whose children cannot take by inheritance, but become, at birth, each invested with interests, equal to that of the father, not because they are heirs of their father, but because they are constituent units in the body politic, these words aptly qualify interests not in private but in public property.

The words "each and every citizen of the United States shall have an equal undivided interest in the whole of the public lands," would accurately characterize the relation of citizens of the United States to those lands. The words of the treaty mean that the Chickasaw holds his "interest," as an interest, not in private, but in public property,—not in his private capacity, but in his political capacity, as a part of the body politic. They mean that the two nations, made up of the aggregate of their respective members, are to hold the lands of both nations in common, but in shares proportionate to the numbers of their citizens, respectively.

The treaty of 1855, on which the appellees base their contention that the individual Chickasaws have vested rights of property in Choctaw and Chickasaw lands, was made between the United States and the Choctaw and Chickasaw nations. These nations were capable of making treaties. As we have seen, they have made many treaties with the United States. They were competent to sell and purchase lands. They had, as nations, sold lands east of the Mississippi to the United States, and purchased land west of the Mississippi from the United States. The Choctaw nation had sold an undivided interest in its lands to the Chickasaw nation. It is to-day in the power of those nations, acting in their corporate capacity, to sell their country to the United States. They can transfer, not only dominion over, but property in,

this land. In so doing they will not take private property and dispose of it for public use, but will sell public property. To land in such a condition, the individual Chickasaw can have no vested right excluding the power of congress to authorize appeals in these citizenship cases.

But is it contended that the Chickasaw has a vested right to the *use* of a separate portion of the common domain of the Chickasaw and Choctaw nations, and that, in this respect, his interest, in that common domain, differs from the interest of the citizen of the United States, in the public lands of the nation? An analysis of the Chickasaw's interest will show that there is no difference which can affect the issues involved in the pending motion. The Choctaws and Chickasaws, together, number 20,000. They own more than 10,000,000 acres of land, exclusive of the leased district. An equal division in severalty would secure to each Chickasaw and Choctaw more than 500 acres. But if any member of either tribe should undertake to segregate a tract of 500 acres from the common stock, and appropriate it to his own *use*, he would undertake to appropriate to his own use that to which 19,999 others have rights identical with his own. Such an undertaking would resemble an undertaking, by a citizen of the United States, to secure the separate use of a part of the public lands. The treaty of 1855 does not secure to the individual Chickasaw the exclusive use of any separate parcel of the land of the Chickasaw and Choctaw nations. Their rights to such use are practically "squatter's rights," regulated, in a rude way, by statute. It is true that individual Chickasaws do enjoy the exclusive use of separate tracts. But there is no equality of use; some hold thousands of acres, others hold each less than a score.

While the individual Chickasaw has no treaty right to

the use of any specific tract of the common domain, he has a treaty right to his share of the net usufruct of the entire territory of the two nations. But this is precisely the right, which the citizen of the United States holds in relation to the public lands. In either case, the benefit comes not directly to the citizen, but to the nation, and, through the nation, to the citizen as a part of the body politic.

A judicial determination that a person is a citizen of the Chickasaw nation, or a citizen of the United States, does not make his citizenship a vested property right in the public lands, or carry, with it, a vested property right, such as to exclude the power of congress to authorize an appeal, after a judicial determination of a party's citizenship, on the ground that such an appeal would *disturb vested property rights in the public lands*.

The law conferred upon the district judge no power to vest any property rights in anybody. It purported to authorize him to decide who were citizens; but it did not purport to authorize him to decide what rights the citizen possessed, and, thereby, vest in him those rights. There are three classes of Chickasaw citizens—citizens by blood, citizens by marriage, and citizens by adoption. The law purported to empower the judge to find, as he did find, that the appellees in this case were citizens by marriage. But it did not authorize him to decide that the rights of the intermarried citizen were the same as those of the citizen by blood, and, by such decision, vest in the intermarried citizen all the property rights of the citizen by blood. Having found that the appellees were *citizens by marriage*, he proceeded to decree that they were *citizens*, and thereupon accorded to them "all the rights and privileges appertaining to such relation," meaning all the rights and privileges of citizens by blood. His decision that

these persons had this or that property right was a nullity. It vested no property right in either of the appellees. Their status, so far as vested property rights are concerned, is fixed, not by Judge Townsend's decision,—nor by his construction of the treaties and laws,—but by the treaties and laws themselves. That the treaties and laws vest in neither of them any property rights whatever I have endeavored to show, in my brief on the merits of the citizenship cases.

#### IV.

Another ground for the motion to dismiss the appeal is stated as follows :

Our contention is that, if the law of 1898 is valid for any purpose, and could apply to judgments rendered prior to its passage, in any way, it only authorized appeals to the supreme court in cases *involving the constitutionality of any legislation affecting citizenship or the allotment of lands in the Indian Territory*, in the language of the act itself. \* \*

The act of March 3d, 1891, establishing the circuit court of appeals and regulating and defining, in certain cases, the jurisdiction of the courts of the United States, provides in section five (5) that appeals, or writs of error, may be taken from the existing district and circuit courts direct to the supreme court in the following cases among others :

"In any case in which the jurisdiction is in issue. In such cases the question of jurisdiction alone should be certified to the supreme court, from the court below, for decision."

Also, "In any case in which the constitutionality of any law of the United States is drawn in question."

Hence, we are of opinion that if the act of 1898 only authorized appeals, to this court, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, and that question being raised in this record as one affecting the jurisdiction of the court, that the appeal should be taken and perfected in accordance with the first clause of section five (5) of the act of the 3d of March, 1891, above referred to ; and the very question of jurisdiction should alone have been certified to the supreme court. And that not being done, the appeal should be dismissed on motion.

The counsel has evidently misunderstood the import of the act of July 1, 1898, authorizing appeals, from the courts in the Indian Territory, to the supreme court. The following is the provision of the act :

Appeals shall be allowed, from the United States courts in the Indian Territory, direct to the supreme court of the United States, to either

party, *in all citizenship cases*, and in all cases, between either of the Five Civilized Tribes and the United States, involving the constitutionality, or validity, of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases.

Appeals are allowed in all citizenship cases, without exception, or limitation. In cases between the United States and either one of the Five Civilized Tribes, appeals are allowed only when the cases involve questions respecting the constitutionality or validity of legislation affecting citizenship, or the allotment of lands, in the Indian Territory. All this is clearly apparent on the face of the statute, which is punctuated precisely as is the foregoing quotation. But then if appeals, in citizenship cases, are only to be taken when those cases involve questions respecting the validity, or constitutionality, of legislation affecting citizenship, or the allotment of lands, in the Indian Territory, the provision is absurdly narrow in scope; for the questions, involved in more than nine-tenths of these citizenship cases, are questions of fact, and of the construction of treaties, constitutions and laws.

Moreover, the reason for the provision that appeals shall be allowed "in all cases between either of the Five Civilized Tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory," is to be found in the words of the acts conferring jurisdiction of such cases upon the lower courts.

The act of June 28, 1898, contains the following provision :

Sec. 2. That when, in the progress of any civil suit, either in law or equity, pending in the United States court, in any district in said territory, it shall appear to the court that the property of any tribe is, in any way, affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit, by service upon the chief, or governor, of said tribe; and the suit shall be thereafter conducted as if said tribe had been an original party to said action.



The district court in the Chickasaw nation has jurisdiction "of all suits at common law, where the United States are plaintiffs," and of all suits in equity, where the matter in dispute equals, in value, the amount prescribed, and the United States are petitioners. Rev. Stat. 563, 629; 26 Stat. 81, sec. 29. Such suits may, or may not, affect the property, real or personal, of the Chickasaw nation. They may, or may not, affect Chickasaw citizenship. When the suit does affect Chickasaw property, the Chickasaw nation becomes a party to a suit in which "the United States are plaintiffs." But such suits, although affecting, in some way, the tribal property, may not involve any question as to the constitutionality, or validity, of legislation affecting citizenship, or the allotment of lands. For obvious reasons, it was the purpose of Congress to authorize no appeals in any such cases, except those which, not only affected property of the tribe, but also, at the same time, involved questions respecting the constitutionality, or validity, of legislation affecting citizenship, or the allotment of lands.

The counsel is equally mistaken as to the effect of the words "under the rules and regulations governing appeals to said court in other cases," when coupled with section 5 of the court of appeals act of March 3, 1891, of which the following is a copy:

Sec. 5. That appeals, or writs of error, may be taken from the district courts, or from the existing circuit courts, direct to the supreme court, in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court, from the court below, for decision.

From the final sentences and decrees in prize cases.

In cases of conviction of a capital or otherwise infamous crime.

In any case, that involves the construction, or application, of the constitution of the United States.

In any case, in which the constitutionality of any law of the United States, or the validity, or construction of any treaty, made under its authority, is drawn in question.

In any case, in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

The reason for the requirement that, in the first of these six classes of cases, the question of jurisdiction alone shall be certified to the supreme court is this: That class includes cases involving federal questions, other than those defined in the next five classes, in addition to the jurisdictional question. But congress did not propose to permit any questions, not specified in the other five classes, to be smuggled into the supreme court, under cover of the jurisdictional question; and therefore, by the language of the clause, withheld such questions from the appellate jurisdiction of that court. It was not the intention of congress to restrict the appellate jurisdiction of the supreme court to the single question of jurisdiction, to the exclusion of the questions expressly made appealable by the five succeeding clauses.

But then if congress, after expressly vesting in the supreme court appellate jurisdiction of the other five classes of cases, had provided that, in those five classes, the jurisdictional question, when involved, should alone be certified, on appeal, that provision would not have divested the supreme court of its appellate jurisdiction, or justified a dismissal of the appeal, in case of the certification of the other questions. The provision would have been merely directory.

## V.

The reasoning of the appellees, in denial of the competency of congress to authorize these appeals, is based largely upon the alleged hardships to result from the destruction of *long* vested rights, the infraction of *long* established rules of property, and the disturbance of *long* set-

tled relations and conditions. But all this reasoning *ab inconvenienti* fails in this case, because there was no semblance of antiquity about these judgments, when the law authorizing the appeals was enacted. It was enacted by the first congress that met after the judgments were rendered, disclosing the gravity of the wrongs which would result from their enforcement. Indeed the counsel himself says elsewhere in his brief, that the appellees, who commenced the erection of houses on lands claimed under these judgments, had not time to complete them, before congress authorized the appeals.

If the rules of unwritten law, applicable to these cases, based upon principle, or authority, do not require the court to hold that congress was competent to authorize the appeals, certainly there is no such rule constraining the court to make a contrary decision. It is clear that no conclusion can be reached more unfavorable to the appellant than this, that the court is free to render such a decision of the question as justice shall appear to demand, in these particular cases. It will not be difficult, I think, to convince the court that justice imperatively demands the affirmance of the power of congress to authorize these appeals unless the judgments themselves are void for want of jurisdiction. To that end, I will refer to the records, in a few of the sixty-eight Chickasaw appeals.

In the particular case now under consideration, Richard C. Wiggs married Georgia M. Allen, a Chickasaw. After her death, he married Josie Lawson, a white woman; and a white child, Mary Edna Wiggs, was born of this second marriage. Judge Townsend decreed as follows:

It is therefore considered ordered and decreed that the said Richard C. Wiggs and his wife, the said Josie Wiggs, and their daughter, the said

Mary Edna Wiggs, be and they are hereby admitted to citizenship in the Chickasaw nation, and to enrollment as members of the tribe of Chickasaw Indians, with all the rights and privileges appertaining to such relation.

In No. 473 the district judge decided that, by virtue of the first article of the treaty of 1855, and the thirty-eighth article of the treaty of 1866, the white man A, who married a Chickasaw woman B, became at once invested with Chickasaw citizenship, not merely for jurisdictional purposes, but to all intents and purposes, and therefore acquired all the rights and privileges appertaining to Chickasaw citizenship. He decided, also, that if A, after the death of his Chickasaw wife B, married a white woman C, and white children were born of this second marriage, the white wife C and her white children all became Chickasaw citizens, holding the same vested rights. And he decided, further, that if, after the death of the white husband A, his white widow C married a second white husband D, and white children were born of this third marriage, the white man D and all his children acquired the same vested rights. And finally he decided that if the white children of these several marriages themselves married white persons, those white persons and their white children all acquired the same vested rights. In accordance with these decisions he held, in twenty-six of the pending cases, that seventy-five white persons, who were husbands of white wives, wives of white husbands, or children of white parents, were Chickasaw citizens, and that twenty-six white men, who had been husbands of Chickasaw women, but, after their Chickasaw wives had died or been divorced, had married white women, were entitled to citizenship and acquired the same vested rights. By this ingenious process of devolution one hundred and one names were added to the roll of Chickasaw citizens.

In my brief, herewith filed, relating to the general

questions involved in these citizenship cases, I have attempted to show that not one of those persons was entitled to enrollment.

By an act of the Chickasaw legislature, passed in 1856, "the right of citizenship" was granted to five white girls. The constitution, then in force, prohibited the legislature from granting any right of citizenship "further than" the right "to settle and remain in the nation and to be subject to its laws." The act was repealed in 1857, but was afterwards, by mistake, printed in compilations of the Chickasaw laws. The testimony of Judge Overton Love, on this subject, in No. 486, will be found to be "interesting reading." The district court, overruling the Dawes Commission, has, in Nos. 469, 477 and 486, enrolled, as citizens entitled to all the rights and privileges of Chickasaw citizenship, thirty-two white persons, descendants of those white girls, and husbands, or wives, of their descendants.

In the single case of *The Chickasaw Nation, Appellant, v. Wm. Burch et al.*, No. 517, eighty-three persons, apparently without the slightest trace of Indian blood, applied to the Dawes Commission for enrollment as citizens of the Chickasaw nation. Some of them claimed enrollment on the ground that they were descendants of a woman alleged to have been a Chickasaw, and to have lived in the state of Mississippi, near the close of the eighteenth century. The others claimed as husbands, or wives, of her descendants. The evidence produced, in maintenance of their claims, largely hearsay, was too nebulous and flimsy to warrant a judgment even in Solon Shingle's "first-class cow case;" and they were all rejected by the Dawes Commission. But the district judge reversed the decision of that Commission, and adjudged them all to be citizens, adding eighty-three names to the roll of those entitled to share in the lands of the Choctaws and Chickasaws.

In No. 472, the clerk, acting as master, reported as follows :

John Calvin Hill is a brother of Evans Hill, and a lineal descendant of Charles Matlock, a Chickasaw Indian, who lived and died in the state of Tennessee. While Charlie Matlock was a Chickasaw Indian, there is no proof to show that he, or his descendants, with the exception of Evans Hill a brother of the applicant, had any connection with the Chickasaw tribe of Indians. John B. Hill many years ago emigrated from the state of Tennessee to the state of Texas, where he now resides. Both he and his prolific family are citizens of the United States ; that they vote and exercise all other rights of citizenship of the United States, and have their domicile in the state of Texas. Under the law, as I believe it to be, if they had resided in the Indian Territory and asserted their rights to citizenship, they would have been, according to the technical rule, and no other, entitled to enrollment. But they are resident citizens of Texas, and have property and homes in the state, and, according to the fair rules of justice, they are no more entitled to citizenship.

The case was subsequently referred to a different master, who reported that Charlie Matlock was a "quarter breed Chickasaw," and that none of the applicants ever resided in the Indian Territory before they filed their applications. The Dawes Commission had rejected them all ; but the district judge enrolled fifty-four, some as descendants of Matlock, and the others as husbands or wives of his descendants.

In No. 476 the master reports that "the proof of the applicants amounts to little more, if any, than a mere family tradition of Indian blood." He recommended the rejection of all the applicants. They had all been rejected by the Dawes Commission. But the case was referred to another master, who reported as follows :

I am of opinion, from the testimony of Simson and Wolfe, and from the testimony of the family tradition, that all the applicants herein are the legal descendants of the said Nancy Frazier, who was a Chickasaw Indian, except the said Elizabeth McDuffie, S. M. Crawford, George Jarvis, and Wm. M. McCartney, who are intermarried citizens, and that they are each and all of them entitled to enrolment.

Accordingly the district judge enrolled twenty-one as descendants of Nancy Frazier, and four as husbands or wives of her descendants.

In No. 520, the master reported as follows :

It appears, from the evidence in the case, that the applicants are the descendants of Elizabeth Colbert, a Chickasaw Indian by blood, who married a man by the name of George Stewart; that the said George Stewart and Elizabeth Colbert had a daughter, by the name of Elizabeth Stewart, through whom these applicants claim; that said Elizabeth Stewart married a white man by the name of Bledsoe Holder; that said Bledsoe Holder and Elizabeth Stewart had a number of children, among them being Wm. L. Holder, Jackson A. Holder, and Burton A. Holder; that the said Bledsoe Holder and wife lived in the old Chickasaw reservation, in the state of Mississippi, and left the state of Mississippi, with the other Indians, en route to the Indian Territory, but that they stopped, with their children, in southwest Missouri, and remained there about twenty years; that they afterwards came into the Indian Territory, and finally drifted to the northern border of Texas and remained there a number of years. It appears, from the evidence, that the said Bledsoe Holder and Elizabeth Holder and their descendants, who are concerned in this application, at all times claimed to be citizens of the Chickasaw nation, and that they lived in, and about, the Chickasaw nation, from time to time, ever since they came west of the Mississippi river, and that they in fact have Chickasaw blood in their veins.

The judge thereupon added ninety-nine to the roll of Chickasaw citizens, all of whom had been rejected by the Dawes Commission.

HALBERT E. PAINE,  
*Atty. for Chickasaw Nation.*

N. 496.

FEB 23 1899  
JAMES H. MCKENNE

IN THE  
*Brief of Paine for Appellant.*  
Supreme Court of the United States.

OCTOBER TERM, 1898.  
*Filed Feb. 23, 1899.*

No. 496.

THE UNITED STATES, Appellant,

vs.

RICHARD C. WIGGS et al.

Appeal from District Court in Chickasaw Nation.

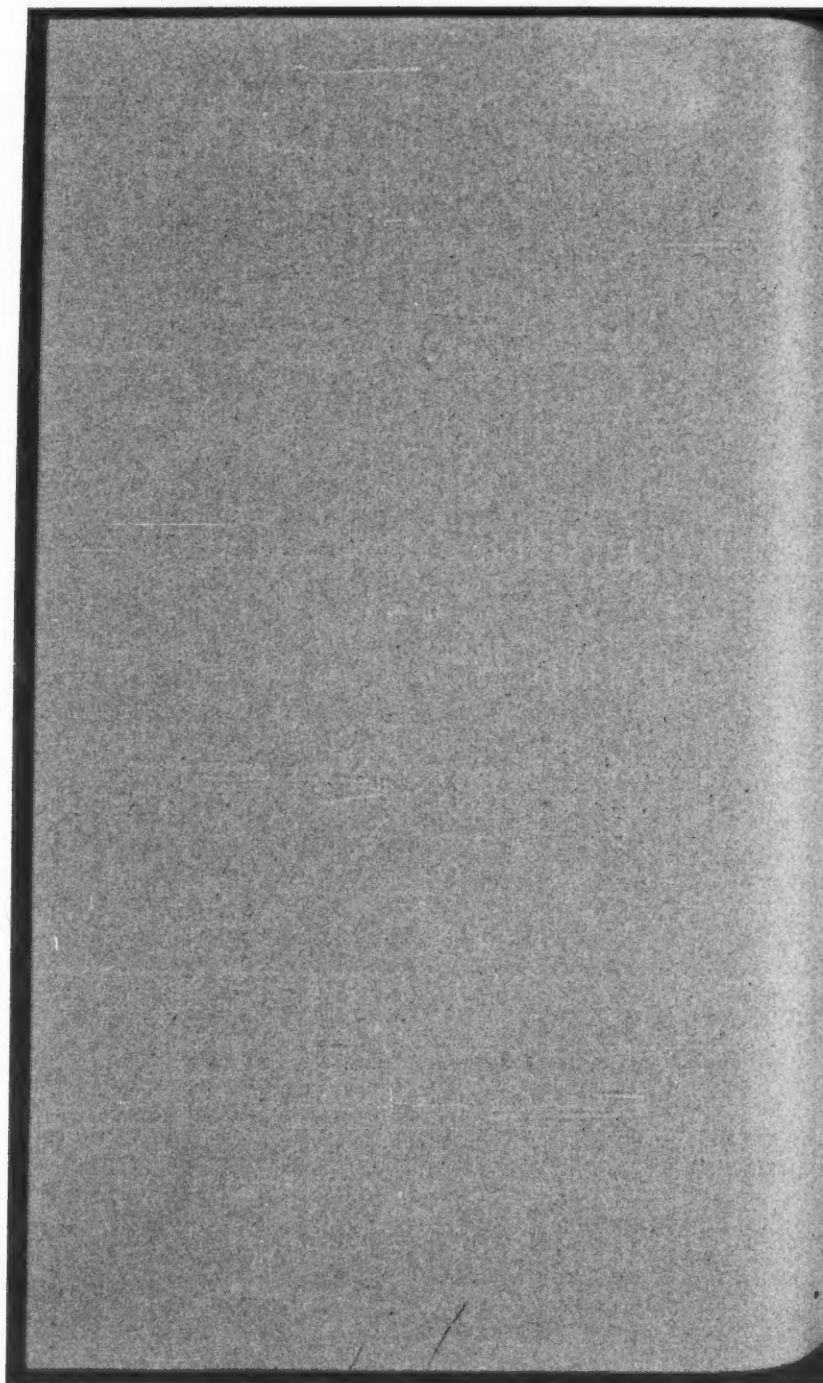
BRIEF FOR APPELLANT.

HALBERT E. PAINE,

*Attorney for Chickasaw Nation.*

WASHINGTON, D. C. :  
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1899.





# Supreme Court of the United States.

OCTOBER TERM, 1898.

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No. 496.

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THE UNITED STATES, APPELLANT,

*v.*

RICHARD C. WIGGS ET AL.

---

*Appeal from the District Court in the Chickasaw Nation.*

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## BRIEF FOR APPELLANT.

HALBERT E. PAINE,

*Atty. for Chickasaw Nation.*

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The enactment of the legislation, which disclosed a purpose, on the part of congress, to secure the allotment, in severalty, of the lands of the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles, occasioned a very remarkable migratory movement, among the people of the southwestern states. Applications for admission to the rolls of citizens came pouring in, by thousands, from Texas, Arkansas, Louisiana, Mississippi, Alabama, and Georgia. Men, women, and children who had never set foot, or thought of setting foot, in the Indian Territory,

whose ancestors had never seen or cared to see that country, jostled each other, in the mad rush for shares in the fertile lands of these Indian nations.

From every quarter came white men, who claimed to be husbands of white women who had previously been wives of Chickasaws, and white women who claimed to be wives of white men who had previously been husbands of Chickasaw women, and men, women, and children who claimed to be descendants of white men or white women who had once been the husbands or wives of Chickasaws, all importunately demanding to be enrolled as citizens of the Chickasaw nation.

It was no paltry prize that excited the cupidity and stimulated the zeal of these adventurers. The Choctaws and Chickasaws together number 20,000, and they possess more than 10,000,000 acres of land, not surpassed, in fertility, by any land of equal area on this continent. Each man, woman, and child, who is invested with all the rights and privileges of either Choctaw, or Chickasaw citizenship, will be entitled, when an allotment, in severalty, is made, to five hundred acres, worth from five dollars to ten dollars per acre. Four thousand claimants, wrongfully foisted upon the Chickasaw and Choctaw rolls, will rob the Choctaws and Chickasaws of 2,000,000 acres of land worth from \$10,000,000 to \$20,000,000. The Chickasaws and Choctaws, therefore, have legitimate and very urgent reasons for resisting the unlawful enrollment of applicants for citizenship.

The object of most, if not all, of these applicants for Chickasaw enrollment, who have never resided in the Chickasaw nation, or have abandoned the nation, but claim to have Chickasaw blood, is to obtain an allotment of Chickasaw and Choctaw lands and of Chickasaw moneys. Chickasaw citizenship would be valueless to

them, without these property rights. And the real question, in all these Chickasaw cases, is whether the claimants are entitled to allotments of shares in the lands and moneys of the Chickasaws. The judgments of the Commission to the Five Civilized Tribes were reversed, in sixty-seven of the cases, by the district judge, who referred them to masters, for report, and confirmed their reports, in all cases in which their decisions were adverse to the Chickasaws.

The district judge delivered an opinion, in which, after commenting upon certain Choctaw and Chickasaw treaties, he announced the principles upon which his judgments in those cases would be based. His opinion is printed in the record of each of the cases. The following is the closing paragraph :

Along the lines herein indicated the citizenship cases, pending in this court, will be disposed of.

In conformity with this opinion he has, in different cases, decided,

First. That all persons having Chickasaw blood are citizens of the Chickasaw nation, whether residents, or not residents, of that nation.

Second. That citizens by marriage can not be deprived of, or forfeit, their citizenship, while residing in the nation.

Third. That an intermarried white man, who, after the death of his Chickasaw wife, marries a white woman, thereby confers Chickasaw citizenship upon the white wife ; and if, after his death, his white widow marries a white man, she confers Chickasaw citizenship on him ; and if, upon her death, her surviving white husband marries another white wife he confers Chickasaw citizenship on her ; and has also decided that the white children of these several marriages are Chickasaw citizens, and

confer Chickasaw citizenship upon their white husbands and wives.

# I.

## CITIZENS BY BLOOD.

In his opinion the district judge said :

I shall hold that non-resident Choctaws and Chickasaws, who have properly filed their applications, and established their membership of the tribes, shall be admitted to the roll as citizens.

What the judge meant, as shown by the context, was this, that he would hold that non-residents of the Choctaw and Chickasaw nations, who had properly filed their applications, and proven their Choctaw or Chickasaw blood, were to be admitted to the roll as citizens. He based the conclusion which he had reached upon three grounds, as follows :

1. In all these various treaties, solemnly entered into, there is not one line or word to indicate that the Choctaws and Chickasaws, who did not remove to the western country, were not Choctaw or Chickasaw citizens and members of their respective tribes.

2. In the treaty of 1830, between the Choctaws and the United States, it is expressly provided that those who remained should "not lose the privilege of a Choctaw citizen, but, if they ever remove, are not to be entitled to any portion of the Choctaw annuity."

3. When it was supposed that the lands would be allotted in severalty, under the treaty of 1866, it was expressly provided that notice should be published in the papers of several states, that absent Choctaws and Chickasaws might come in and obtain the benefit of the allotments; and absentees were to be allowed five years to occupy and commence improvements, and all that was necessary was to satisfy the register of the land office that that was their intention. The allotment did not take place; but if they had not come in, they were only to lose their allotment of land; it did not make them any the less Choctaws, or Chickasaws, or members of the Choctaw and Chickasaw tribes.

If it is true that in the treaties prior to that of 1830, "there is not one line or word to indicate that the Choctaws and Chickasaws, who did not remove to the western country, *were not* to continue to be citizens of the Choctaw and Chickasaw nations," it is equally true that these

treaties contained nothing to indicate that those who remained in Mississippi *were* to continue to be citizens of their respective nations. On this precise point those treaties are absolutely silent. There is nothing in the language, nature, object, scope, or circumstances of the treaties warranting any *legitimate inference* therefrom that those who remained in Mississippi were to continue to be citizens. That this inference is not warranted by any principle of justice, or of public law, or of public policy, or by the general spirit and intent of the treaties, will appear from considerations hereafter to be suggested to the court.

The second ground, on which the district judge bases his decisions, is the stipulation at the close of article 14 of the Choctaw treaty of September 27, 1830. As stated by the judge, this stipulation was, that, upon the emigration of the Choctaw nation, all "those who remained should not lose the privilege of a Choctaw citizen." But such was not the tenor of the stipulation. In order to make its meaning clear, I present the entire article.

Article XIV. Each Choctaw head of a family being desirous to *remain and become a citizen of the states* shall be permitted to do so, by signifying his intention to the agent, within six months from the ratification of this treaty; and he or she shall, thereupon, be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age; and a quarter-section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the states, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. *Persons who claim under this article shall not lose the privilege of a Choctaw citizen*, but, if they ever remove, are not to be entitled to any portion of the Choctaw annuity.

Now the last clause did not secure, or purport to secure, a continuance of "the privilege of a Choctaw citizen" to all Choctaws who remained in Mississippi, after the emigration of the tribe, but only to such as *claimed under this*

*article.* The only persons who were permitted to "claim under this article," were the heads of families and their unmarried children living with them. To no others was this guaranty against loss of this privilege extended. And even heads of families could not avail themselves of it otherwise than by making "claim under this article." No provision whatever was made for claims by unmarried adults, who did not live with their parents, or for unmarried children, who did not live with their parents, or for orphans, who were not heads of families.

Again, the continuance of "the privilege of a Choctaw citizen" was only promised to heads of families and their unmarried children living with them, in case they intended to become citizens of the states, and signified such intention to the agent within six months after the ratification of the treaty. Moreover, this "privilege of a Choctaw citizen," conditionally promised to heads of families and their unmarried children, was to terminate when they became citizens of the states, at, or before, the expiration of five years after the ratification of the treaty. The treaty was ratified February 24, 1831. "The privilege of a Choctaw citizen" conferred upon heads of families and their unmarried children living with them, if they remained in Mississippi, expired in 1836—sixty-two years ago.

The presence of the stipulation that "persons who claim under this article shall not lose the privilege of a Choctaw citizen" does not, I submit, prove, or tend to prove, that, in the absence of such a stipulation, either the tribal polity of the Choctaws, or public law applicable to the case (to say nothing of other relevant treaty stipulations), would have secured a continuance of "the privilege of a Choctaw citizen" for five years, even to the "persons who claimed" under article 14 of the treaty. On the contrary, the fact that it was deemed necessary

to insert this stipulation in the treaty, in order to continue the privilege, even to the class provided for, shows that, in the absence of such a stipulation, the tribal polity of the Choctaws would not have continued that privilege.

The Choctaw heads of families and their unmarried children living with them, having claimed under article 14 of the treaty, retained the "privilege of a Choctaw citizen," until they became citizens of the States,—in no event longer than five years after the ratification of the treaty. But the continuance of this privilege was secured to them by the last clause of article 14, and by *nothing else*. The scope and efficacy of that provision were restricted to the identical class of persons, who claimed under that article. It did not apply to heads of families, who remained in Mississippi after the emigration, but made no claim under article 14, or to their families. It did not apply to unmarried adults who did not live with their parents, or to unmarried children who did not live with their parents, or to unmarried orphans. It did not apply to Choctaws who had been born and always resided in Louisiana, or Texas, or Arkansas, or elsewhere outside the state of Mississippi. It did not apply to Choctaws born twenty, thirty, forty, fifty, or sixty years after the date of the treaty.

But the district judge disregarded this restriction. He concluded, not merely that heads of families and their unmarried children living with them, claiming under article 14 of the treaty, continued to be citizens of the Choctaw nation, but that all persons, who had Choctaw blood in their veins, whether living in 1830, or born fifty or sixty years after 1830, whether living in the Choctaw nation, or in the state of Mississippi, or elsewhere, were Choctaw citizens,—that is to say, he decided, in effect,



that persons of Choctaw blood, who were born and had always resided in Louisiana, or Texas, or Arkansas, and had never visited the Choctaw nation, were, nevertheless, Choctaw citizens. Moreover, he so expanded this conclusion as to embrace, in its scope, the Chickasaws, to whom it is quite as inapplicable as to the Mohawks or Modocs. I respectfully submit that article 14 of the treaty affords no support to such a conclusion.

But what was this "privilege of a Choctaw citizen," which was secured to certain Choctaws claiming under article 14 of the treaty of 1830? It is for the appellees to show what it was. This privilege was not defined in that treaty or in any prior treaty. In 1830 the Choctaws had no written constitution or laws. It will not be easy for the appellees to extract from vague tradition an accurate description of this privilege. But that is not material; for, whatever else it was, it was not the privilege of holding, as a private individual, the title of a tenant in common of the territory occupied by the Choctaws, which in 1820 included 12,965,000 acres of land in the state of Mississippi. It is certain that the Choctaws, as individuals, held no vested property rights in those lands. It is certain that their interest therein was not so near to private property as is the interest of citizens of the United States in the public lands.

This privilege, whatever it was, was not promised to any Chickasaw whatever. At that time there was no political connection between the Choctaws and Chickasaws. Their lands were contiguous, but were not held in common. It is certain that few and probable that none of the Choctaws, who claimed under the treaty of 1830, sixty-nine years ago, are included among the thousands of applicants for *Choctaw* citizenship, who have besieged the Dawes Commission and the district court. Of course

none of them could, under any pretext, claim *Chickasaw* citizenship. The district judge is of the opinion that this conditional promise of an undefined privilege, made to a specified class of Choctaws, living in 1830 and making a certain claim under the treaty of that year, secured to thousands of Chickasaws as well as Choctaws born forty, fifty, or sixty year afterwards, the right to allotments of equal shares in the Choctaw and Chickasaw lands. This theory supposes a disproportion between cause and effect, which is marvellous if not miraculous.

The district judge seems to be equally mistaken in his opinion as to the effect of the conditional stipulation, contained in the treaty of 1866, which furnished the third ground of his decision. In article 12 of that treaty it was agreed, that, if the legislatures of the Choctaw and Chickasaw nations should decide to allot their lands in severalty, (which, by the way, they refused to do), certain public notices should be given; and thereafter the Choctaws and Chickasaws should be permitted to select each one quarter section of land, to be held in severalty. In the next article it was provided as follows:

Article XIII. The notice, required in the above article, shall be given, not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the states of Mississippi and Tennessee, Louisiana, Texas, Arkansas, and Alabama, to the end that such Choctaws and Chickasaws, as yet remain outside of the Choctaw and Chickasaw nations, may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws; provided that, before any such absent Choctaw or Chickasaw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become *bona fide* residents in the said nation, within five years from the time of selection, and should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land thereafter shall be discharged from all claim on account thereof.

This stipulation does not purport to *recognize existing rights* of these absentees. It purports to *confer upon*

*them* certain rights, provided the Choctaw and Chickasaw legislatures should decide to do, what they, in fact, refused to do, viz: allot their lands in severalty. Upon that condition it purports to confer upon non-resident Choctaws and Chickasaws certain rights, which, by article 15 of the same treaty, were conferred upon resident Choctaws and Chickasaws. Instead of warranting an inference that the tribal systems, or polity, of the Choctaws and Chickasaws, secured the rights of citizenship to absentees, it obviously necessitates the contrary inference. The circumstance that it was found necessary, in order to secure these rights to absentees, to make special provision therefor, implies that, in the absence of such special provision, absentees would not be included in a general provision for Choctaws or Chickasaws.

But then the right, which was conferred on the absentees, upon a condition which the Choctaw and Chickasaw legislatures refused to perform, was not the right of *citizenship*, but only the right to *select 160 acres of land*. By the agreement of 1898, the right to select forty acres of land in the Chickasaw nation was granted to each Chickasaw freedman. But no freedman was made a Chickasaw citizen, by the grant of this right. Moreover the right secured by article 13, such as it was, could only have been enjoyed, upon the performance of certain conditions, within a period not greatly exceeding five years from 1866. It would have expired more than a quarter of a century ago. No Choctaw or Chickasaw, who was absent from his nation in 1866, and failed to become a bona fide resident therein a quarter of a century ago, could have acquired 160 acres of land, (to say nothing of citizenship) by virtue of this treaty stipulation, even if the Choctaw and Chickasaw legislatures had decided to allot their lands in severalty.

The provision requiring these absentees to become *bona fide* residents of their respective nations is, in spirit and effect, adverse to the contention that Choctaw or Chickasaw blood constitutes an unassailable title to Choctaw or Chickasaw citizenship, without regard to residence. But finally back of all this is the fact that the legislatures of the Choctaw and Chickasaw nations refused to make the proposed allotments in severalty, and, therefore, the rights in question never vested, either in residents, or in non-residents.

I submit that the reasoning of the district judge does not warrant his decision that Choctaw or Chickasaw blood, irrespective of residence, secures a perfect title to Choctaw or Chickasaw citizenship. I now beg the attention of the court to the considerations which seem to me affirmatively to show that the conclusion of the judge, on this question, was altogether erroneous.

Upon the non-resident claimants of Chickasaw citizenship rests the burden of proving that residence, which is an inseparable qualification of citizenship in the American nation, and in the several states and territories, is not an inseparable qualification of citizenship in the Chickasaw nation. Upon them rests the burden of indicating such differences in constitutions, laws, usages, or political systems, as will occasion this alleged difference in the qualifications of citizens. It is not provided, in any treaty, or in the Chickasaw constitution, or in any Chickasaw law, or in any law of the United States, that Chickasaw blood shall entitle a claimant to Chickasaw citizenship, without residence in the Chickasaw nation. In the absence of such a provision, there is no better reason for holding that a man with Chickasaw blood, who has never resided in the Chickasaw nation, or has abandoned the nation, is a Chickasaw citizen, than for holding that a man

with Virginia blood, who has never resided in Virginia, or has abandoned that state, is a citizen of Virginia.

As to some of the qualifications for citizenship, the Chickasaw nation differs from the United States, and also from the several states and territories. For example, every person born in the United States, except representatives of foreign powers, becomes, at birth, a citizen of the United States, and also of the state in which he was born. But only a small proportion of the persons born in the Chickasaw nation become, at birth, citizens of that nation. Only those become citizens whose parents are citizens by birth, marriage, or adoption. The whites in the nation number more than 50,000, and the blacks more than 5,000, while the citizens by blood, marriage, and adoption, number less than 5,000.

Again, upon the marriage of a foreign woman to a citizen of the United States, she herself becomes a citizen; but a man, who is the subject of a foreign power, does not become a citizen of the United States, upon his marriage to a woman who is a citizen. But, in the Chickasaw nation, both white men and white women, who marry Chickasaws, become Chickasaw citizens. Moreover, while foreigners are naturalized in the United States, by the courts, in pursuance of legislative provisions; in the Chickasaw nation, they are only naturalized by the legislature, by specific acts of adoption.

And yet, in all these political communities,—in the United States, in the several states and territories, and in the Chickasaw nation, residence is one of the qualifications for citizenship. Although not the only qualification, it is, in all of them, an indispensable qualification. Chickasaw blood is not a perfect qualification for citizenship; nor is it even an indispensable qualification. Citizens by marriage, or adoption, have no Chickasaw blood.

On the other hand, residence, while not, in itself, a perfect qualification, is, nevertheless, a necessary qualification. As there can be no citizenship by blood, without residence, so can there be no citizenship by marriage, or adoption, without residence.

Blood is not conclusive of citizenship, in the European nations, in the American nation, in any of the states, or in the organized territories. If it is so in the Choctaw and Chickasaw nations, this condition must result either from some differences of polity, or from some specific and exceptional provisions of treaties, constitutions, or laws. A man born in a foreign country, and never a resident of the United States, in whose veins is no blood, save that of ancestors, who have resided in the United States since the coming of the Mayflower, has American blood ; but he is not a citizen of the United States. Residence in the United States is an indispensable condition precedent to the acquisition of such citizenship. It is also an indispensable condition precedent to the acquisition of citizenship in any of the states, or territories.

A man whose paternal and maternal ancestors were, through many generations, native Virginians, whose father and mother removed to Kentucky, where he, himself was born, has Virginia blood ; but, unless he removes to the state of Virginia, and in good faith makes that state his residence, he is not a citizen of Virginia. If, having been born in Virginia, he abandons that state, for a permanent residence in another, he ceases to be a citizen of Virginia. Chickasaw citizenship may be acquired and lost in the same way, except that only Chickasaws by blood, marriage, or adoption, can acquire Chickasaw citizenship ; but any citizen of the United States, with or without Virginia blood, may acquire citizenship in Virginia.

Will it be asserted that the Chickasaw nation is a mere

ethnical community, and that, therefore, every person, having Chickasaw blood in his veins, is a member of the Chickasaw family, or race, wherever he may reside? This will be a mistake. It is probable that a majority of the citizens of the Choctaw nation have more or less Choctaw blood, and that a majority of the citizens of the Chickasaw nation have more or less Chickasaw blood. But a large part of the citizens of the Chickasaw nation, who have Chickasaw blood, have also Caucasian blood, and, so far as blood is concerned, are more nearly akin to the white than to the Indian race. The same thing is true of the Choctaw nation. Again many Chickasaw citizens are Choctaws by blood, and have no Chickasaw blood whatever. They have become Chickasaw citizens, by intermarriage with Chickasaws. And this is also true, *vice versa*, in the Choctaw nation. Moreover, in each nation large numbers of intermarried and adopted whites, and their descendants, are citizens. And then all the former slaves of the Choctaws and their descendants, though of African descent, are Choctaw citizens. The position that there is anything in the ethnical condition of the Choctaw, or Chickasaw, nation to distinguish it from one of our states or territories is, therefore, untenable.

Although the two tribes were formerly implacable foes, often at war with each other, yet for more than one hundred years they have been friends, as well as neighbors, and have now become as thoroughly intermingled as the Germans and Irish in the state of Wisconsin; and even their original very marked differences of physiognomy have almost entirely disappeared. The task of preparing separate rolls of the Chickasaw citizen of full blood, and of those of mixed Chickasaw and Choctaw blood, would prove an exceedingly difficult, if not an absolutely impos-

sible task. Whatever may have been true two hundred years ago, there is no ground for the contention that the Chickasaw nation is, at the present time, or has been, at any time within the last fifty years, a mere race,—a purely ethnical community. That nation is as thoroughly a political community,—a body politic,—as is the state of Virginia, or the Territory of Arizona.

But the theory that the Chickasaw nation is a mere family of one common lineage, and not a body politic, is swept away by the following provision of the treaty of 1855:

Art. 5. The members of either the Choctaw or the Chickasaw tribes shall have the right freely to settle within the jurisdiction of the other, and shall, thereupon, be entitled to *all the rights, privileges, and immunities of citizens thereof*; but no member of either tribe shall be permitted to participate in the funds belonging to the other tribe.

By virtue of this stipulation, all Choctaws, while residing in the Chickasaw nation, are entitled to all the rights, privileges, and immunities of Chickasaw citizens, and are, to all intents and purposes, Chickasaw citizens. The only privilege excepted is the privilege of sharing in the Chickasaw funds. There is no exception, so far as the lands are concerned. The Choctaws number 15,000 and the Chickasaws 5,000. There are now in the Chickasaw nation large numbers of Choctaws, who enjoy all the rights, privileges, and immunities of Chickasaw citizens. The tendency of migration, between the Choctaws and Chickasaws, is from the Choctaws to the Chickasaws. If 5,000 Choctaws should, by residence in the Chickasaw nation, become Chickasaw citizens, there would be more Chickasaw citizens of Choctaw than of Chickasaw blood. The fact that this is a possibility is fatal to the contention that Chickasaw blood is conclusive of Chickasaw citizenship.

The theory that an admixture of Chickasaw blood con-



stitutes an unimpeachable title to Chickasaw citizenship, without regard to residence, or enrollment, is negated by the following provision of section 21 of the act of June 28, 1898 :

No person shall be enrolled, who has not heretofore removed to and, in good faith, settled in the nation, in which he claims citizenship; *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights, or privileges, which the Mississippi Choctaws may have, under the laws of, or the treaties with, the United States.

The effect of this provision is that an applicant for enrollment may be a Chickasaw of the full blood, and yet, if he "has not heretofore removed to and in good faith settled in the nation," he can not be enrolled, and can not become a Chickasaw citizen.

This theory, as to the efficacy of Chickasaw blood, is also negated by the following clause in the same section of the act of June 28, 1898 :

The rolls so made, when approved by the secretary of the interior, shall be final; and the persons, whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

Under this provision, the rolls prepared by the Dawes Commission and perfected, on appeal, by the supreme court, when finally approved by the secretary of the interior, contain the names of all the citizens of the Chickasaw nation, except citizens who thereafter become such by birth, adoption, or marriage. After the approval of the roll, by the secretary of the interior, applicants for enrollment can not become citizens of the Chickasaw nation. This is obviously fatal to the contention that Chickasaw blood constitutes an unassailable title to Chickasaw citizenship.

It has been held by the district judge, and is contended by all the applicants, who claim citizenship under article

38 of the treaty of 1866, that it is provided, in that article, that :

Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation \* \* in all respects as though he was a native Choctaw or Chickasaw.

If this is the effect of the stipulation, native citizens and intermarried citizens are the same in all respects,—that is to say, their rights, qualifications and obligations as citizens are the same. But by this same article residence is made a necessary qualification of the intermarried citizen. It is therefore recognized as a necessary qualification of the native citizen ; and it would have been made a qualification of the native citizen, by this stipulation, if it had not already been one of his qualifications.

In 1891 the Choctaw council regarded special legislation as essential to the admission to Choctaw citizenship of Choctaws who had resided, since the emigration, in the state of Mississippi. The following act was approved April 8, 1891 :

An act admitting certain Choctaws from Mississippi to citizenship in the Choctaw nation.

*Be it enacted by the general council of the Choctaw nation assembled.* That Joe Willis \* \* and Eva Sam, all having just come from the old nation, in Mississippi, are hereby admitted to all of the rights and privileges of citizenship in the Choctaw nation, and this act shall take effect and be in force from and after its passage.

The sixteenth general provision of the Chickasaw constitution of 1867 is subversive of the theory that the Chickasaw nation is a mere race, and not a body politic.

Sec. 16. That no inconvenience may arise from the political separation between the Choctaws and Chickasaws, it is hereby declared that all rights, privileges and immunities of citizens, secured, under the fifth article of the treaty of June 22, 1855, to all Choctaws, who are now, or may hereafter become, residents, within the limits of the Chickasaw nation, are fully recognized and protected.

No qualification of citizenship is prescribed in either of the Choctaw or Chickasaw constitutions. But in the

Chickasaw constitutions of 1856 and 1867, and in the Choctaw constitution of 1860, residence is made one of the qualifications of voters and officers. It is also made one of the qualifications of officers in an act of the Chickasaw legislature, approved October 17, 1876, and in an act of the Choctaw legislature approved October 16, 1860; and by the act of November, 1886, it was provided that no non-resident Choctaw, having less than one-eighth Choctaw blood, should be admitted to Choctaw citizenship.

The question of the right of expatriation may not be exactly the same in the case of an independent sovereignty, like the United States, as in the case of a subordinate government, like one of the states, or the Chickasaw nation. And yet a citizen of the United States, who abandons his country and becomes a permanent resident of a foreign nation, loses, not only his state citizenship, but also his national citizenship. He may not become a citizen of the foreign nation, for, although capable of expatriating himself from one country, he may not be able to naturalize himself in another. Expatriation from one country does not *per se* effect naturalization in another. The Chickasaw by blood, who has abandoned his nation, has voluntarily and effectually expatriated himself, although incapable of making himself, without naturalization, a citizen of the United States. In *Elk v. Wilkins*, 112 U. S. 94, the supreme court held that:

An Indian, born a member of one of the tribes within the United States, which still exists and is recognized as a tribe, by the government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a state, but has not been naturalized, or taxed, or recognized as a citizen, either by the United States, or by the state, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of the amendments of the constitution.

But the court has not held that an Indian is incapable

of expatriating himself. On the contrary, in this opinion, the court said :

The act of July 27, 1868, ch. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that, 'in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority.

The provision, to which the court referred, is embraced in the Revised Statutes, as follows :

Sec. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness ; and whereas, in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship ; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the government thereof ; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed ; therefore any declaration, instruction, opinion, order or decision, of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.

The Chickasaws by blood, who have never resided in the Chickasaw nation, or performed any of the duties of Chickasaw citizenship, cannot, when the day arrives for the distribution of the lands and moneys of the Chickasaws, come in, like vultures after their prey, and demand all the benefits of citizenship. Nor can the Chickasaws by blood, who, after a residence in the nation, have abandoned the country, perpetrate such a wrong upon those who have faithfully performed the duties of citizens, and maintained the national existence, by steadfastly remaining on the soil. If the rest of the Chickasaws had been deserters, as these have been, and abandoned the country, there would be no lands to distribute ; they would all have reverted to the United States.

## II.

## CITIZENS BY MARRIAGE.

The district judge has decided that by virtue of the first article of the treaty of 1855, and the thirty-eighth article of the treaty of 1866, the white man A, who marries a Chickasaw woman B, becomes at once invested with Chickasaw citizenship, not merely for jurisdictional purposes, but "to all intents and purposes," and thereupon acquires all the rights vested in native Chickasaws. He has decided that if A, after the death of his Chickasaw wife B, marries a white wife C, and white children are born of this second marriage, the white wife C and her white children all become Chickasaw citizens, each possessing the same vested rights. He has decided that if, after the death of the white husband A, his white widow C marries a second white husband D, and white children are born of this third marriage, the white man D and his white children all become Chickasaw citizens and acquire the same vested rights. And finally he has decided that if the white children of these several marriages themselves marry white persons, such white persons and their white children all become Chickasaw citizens and acquire the same vested rights. The judge assigns only the following grounds for his decision as to the rights of the white parties to these several marriages, and of their white descendants :

Under section 7 of the general provisions of the Chickasaw constitution, adopted August 16th, 1867, both as originally adopted and as amended, said sections can have but one construction and that that they regarded the said 38th article as binding on their future action, and if this is so, it would not be within the power of either the Choctaw or Chickasaw nation to pass, or adopt, any constitution, or law, in violation of said article, or that would take away the rights, privileges, or immunities, that had attached to any white person, under and by virtue of its provisions.

When a white person has married a Choctaw, or Chickasaw, according to their laws, and resides in the Choctaw or Chickasaw nation, he is, in all respects, as though he was a native Choctaw, or Chickasaw, and his rights, under the treaty, attach, and it is not within the power of the Choctaw or Chickasaw nation to take the same away, by legislation, or otherwise.

For the purposes of the argument let us assume at present that in the sense of the treaty the white husband or white wife of a Chickasaw or Choctaw is to be deemed a member of said nation "in all respects as though he (or she) was a native Choctaw or Chickasaw." Let us first ascertain the rights of the successive white husbands of white wives and white wives of white husbands and their white children; and afterwards the rights of white husbands and white wives of native Chickasaw citizens.

The reasons assigned by the judge for his decision seem to be applicable mainly if not wholly to the white person, who forges the first link in this endless and ramified chain of imputed citizenship. But the applicants themselves base their claims on two grounds, (1) the equality of civil and political rights secured to all Chickasaw citizens, and (2) their vested property rights.

### *Equality of Civil and Political Rights.*

The appellees say that article 38 of the treaty of 1866 secures to the white husband of a Chickasaw woman all the rights of Chickasaw citizenship,—all the rights which a citizen of Chickasaw *blood* possesses; that a Chickasaw by blood has the right, by marrying a *white* wife, to confer Chickasaw citizenship upon her, and upon her children of *mixed blood*; and that, therefore, the *white* widower of a Chickasaw woman has the right, by marrying a *white* woman, to confer full Chickasaw citizenship upon her, and upon her *white children*. They say, further, that after the death of this *white* man, his *white* widow has the

right, by marrying a second *white* husband, to confer citizenship upon him and their *white* children, and so on *ad infinitum*. They say also that the white children of these several marriages, being themselves invested with all the rights of Chickasaw citizenship, have the right, by marrying white persons, to invest them and their children with full Chickasaw citizenship. There are three obvious fallacies in this reasoning :

First. If a citizen of Chickasaw blood has any right to *confer* citizenship upon his white wife, it is merely the right to confer citizenship upon the white wife of a citizen of Chickasaw blood. It is not the right to confer citizenship upon the white wife of a white man. The citizen of Chickasaw blood can not, by marriage, or in any other way, confer citizenship upon the white wife of a white man. If the rights of the white widower of a Chickasaw woman are the same as those of a citizen of Chickasaw blood, this white widower can not, by marrying a white woman, confer citizenship upon the *white wife* of a *white man*. If he could do that, his rights and those of the citizen of Chickasaw blood would not be equal. He would possess a right to which the citizen of Chickasaw blood could not possibly make any pretension. The citizen of Chickasaw blood, if he can *confer* citizenship, at all, can only confer it upon the *white wife* of a citizen of *Chickasaw blood*.

The only power which the native citizen has is this: Through the union of the two races, he is able to bring about such a result that both parties to the union and their children of mixed blood will be "deemed members of the nation." That power, in its entirety, is conferred upon the white man. Through a union of the two races, he, also, can bring about such a result that both parties to the union and their children of mixed blood will be

"deemed members of the nation." In this regard the white citizen now enjoys rights and powers exactly equal to those of the native citizen. But with equality of right he is not content. He demands superiority of right. With equal modesty, the *white citizen* of the United States may demand that, because he is entitled to all the rights of the *colored citizen*, he shall be enabled to make the child of his white wife a mulatto, and, failing in this demand, may insist that he is denied one of the rights accorded to his colored brother.

Second. If the white widower of a Chickasaw woman can, after her death, confer citizenship upon the white children of a white wife, he can do what the citizen of Chickasaw blood can not do; he has a right which the citizen of Chickasaw blood has not. For the citizen of Chickasaw blood can not confer citizenship upon white children; he can only confer citizenship upon children having an admixture of Chickasaw blood. Under the pretense of seeking equality of right the reasoning of the claimants, on both points, aims to secure to intermarried white persons, and their white descendants, unwarranted superiority of right.

Third. But the only right secured, by article 38 of the treaty of 1866, to the white man who marries a Chickasaw wife, is conferred upon the white man, not by the Chickasaw wife, but by the stipulation of the treaty. Individuals can perform acts which treaties, constitutions, or laws make essential to, or decisive of, citizenship; but they cannot confer citizenship.

If, as we are now assuming, article 38 of the treaty of 1866 conferred upon the white man who married a Chickasaw woman any right of citizenship beyond the right to live in the nation and to be subject to its laws, it is clear that the man who married a Chickasaw woman acquired



no right of citizenship at the instant when the marriage ceremony was performed beyond the right to be a citizen while he resided in the nation with his Chickasaw wife. It is not the man who merely marries a Chickasaw wife, that "is to be deemed a member of the nation," but the man who marries a Chickasaw wife and, after his marriage, resides with her in that nation. The right to Chickasaw citizenship, which he acquires at the instant of the marriage, is only an inchoate right. As long as he lives the possibility of the termination of his residence and of his citizenship remains; and upon the continuance of his residence, depends whatever right he has.

But then, article 38 of the treaty of 1866 contains no provision whatever for white persons, who marry the widows or widowers of Chickasaws, or for the white children of such marriages. For the convenience of the court I repeat the article:

Article 38. Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw or Chickasaw nation, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.

The provision of article 38 is that every white person, who, having married a *Choctaw or Chickasaw*, resides in the said Choctaw or Chickasaw nation, is to be deemed a member of said nation. It contains no declaration that every white person, who, having married a *white member* of the Choctaw or Chickasaw nation, resides in that nation, is to be deemed a member of said nation. It contains no declaration to the effect that every white woman, who, having married the surviving white husband of a Chickasaw wife, resides in the Chickasaw nation, is to be deemed a member of that nation, or that every white man, who marries the white widow of a Chickasaw, is to

be deemed a member of the nation. There is no ground for the assumption that the parties to the treaty intended to stipulate that every white person who, having married a white member of the nation, resided therein, was to be deemed a member of the nation.

Such a stipulation would not have promoted the interests of any party to the treaty. The reason for granting Chickasaw citizenship, to white persons intermarried with Chickasaws, is to be readily found in the public policy of the Choctaw and Chickasaw nations. It has been greatly to their advantage to promote marriages between white persons and their own citizens, and to incorporate intermarried whites into their bodies politic. This has been found to be one of the most important agencies in accelerating their progress in civilization. It has tended to advance their education, their agriculture, their commerce, and their legislation. Many of their best and ablest citizens, business men, agriculturists and legislators have been, and now are, of mixed blood. And, what is perhaps the greatest good of all, this intermarriage has wholly broken down all race barriers between the whites and the Chickasaws. But there is no such ground of policy for the promotion of marriages between whites and whites. The Chickasaws have no more interest in the marriage of white "members of the nation" to white persons who are not members of the nation, or in the marriage of white members of the nation to each other, than they have in the marriage of employes of the United States government to each other, or in the marriage of permit-men to permit-women. Nor has the government of the United States the slightest interest in the intermarriage of whites with whites, in the Chickasaw nation.

Whatever may be the nature or extent of the right secured to the white husband of a Chickasaw woman by

article 38 of the treaty of 1866, he will be divested of it, if he shall cease to reside in the nation, or shall wrongfully abandon her, or shall marry a white woman, either after her death, or after the divorce of the parties. Whatever rights of citizenship a white man may have, after he ceases to be a resident of the nation, or after he abandons his Chickasaw wife, or after he marries a white wife, those rights will be his, not by virtue of article 38 of the treaty of 1866, or of article 1 of the treaty of 1855, but by virtue of some other treaties, or of constitutions, laws, or usages of the Chickasaw nation.

The Chickasaws do not accept the construction which the district judge has given to article 38 of the treaty of 1866. They do not understand that the concluding words "in all respects as though he was a native Choctaw, or Chickasaw," qualify, or have any connection, in either sense or syntax, with the words, "is to be deemed a member of said nation." They understand these concluding words to qualify only the clauses conferring upon the nation civil and criminal jurisdiction of the intermarried whites. They believe that the text of the article shows, what they know the historical fact to be, that the article was adopted, not for the purpose of conferring upon intermarried whites property rights to Chickasaw lands, or moneys, or the right to vote, or hold office, but for the sole purpose of subjecting them to the jurisdiction of the Chickasaw courts, and thus relieving the nation from the intolerable nuisance resulting from the exemption of white husbands and wives of Chickasaws from the jurisdiction of their courts and from compulsory attendance on courts hundreds of miles distant from the Chickasaw country.

The Chickasaws contend that if the intent had been to attach to these intermarried whites any incidents of

membership in the tribe, beyond subjection to the jurisdiction of the Chickasaw courts, this jurisdictional subjection would not have been the only incident of membership specified in the article. They insist that if it had been the purpose to confer, upon these intermarried whites, the right to share in the lands, or moneys, of the tribe, or to vote, or hold office, such purpose would have been specified, as well as the purpose to subject them to the jurisdiction of the Chickasaw courts.

The provision is not that every intermarried white person "shall be a member of said nation," but that he "is to be deemed a member of said nation." This language on its face implies that they are to be regarded as members for some particular purpose. The next words show what that purpose was; they show that it was purely a jurisdictional purpose,—that the object was to subject these intermarried whites to the jurisdiction of the Chickasaw courts. The article discloses no other purpose for which they are to be deemed members of the tribe. If the intermarried whites are invested with any rights of citizenship, beyond the right to be subject to the jurisdiction of the Chickasaw courts instead of the courts of the United States, those rights have been derived, not from article 38 of the treaty of 1866, but from other treaties, or from Chickasaw constitutions, or laws.

But what are these claimants to gain by invoking the aid of other treaties, or of Choctaw, or Chickasaw constitutions, laws, or usages? The first of the provisions relating to this subject, appears in the treaty of October 20, 1832, between the Chickasaws and the United States in the following terms :

Article XV. The Chickasaws request that no person be permitted to move in and settle on their country before the land is sold. It is therefore agreed that no person whatsoever who is not a Chickasaw, or connected with the Chickasaws by marriage, shall be permitted to come into

the country and settle on any part of the ceded lands until they shall be offered for sale.

In 1832, then, both the Chickasaws and the United States held intermarried whites to be not members or citizens of the Chickasaw tribe or nation, but only persons "connected with the Chickasaws by marriage." Next come the following provisions, in the treaty of May 24, 1834:

Art. V. It is agreed that the fourth article of the "treaty of Pontitock" be so changed that the following reservations be granted in fee: "To heads of families, being Indians, or having Indian families consisting of ten persons and upwards, four sections of land are reserved. To those who have five and less than ten persons, three sections. Those who have less than five, two sections. Also those who own more than ten slaves shall be entitled to one additional section, and those owning ten and less than ten to half a section."

Art. VII. Where any white man, before the date hereof, has married an Indian woman, the reservation he may be entitled to, under this treaty, she being alive, shall be in her name.

If the white head of a Chickasaw family had been recognized by the parties to this treaty as a *member of the tribe*, he would not have been denied the place accorded to Chickasaw heads of families in the allotment of the lands. But he was not so recognized. The Chickasaw wife took the family allotment in her own name. In 1834, therefore, neither the Chickasaws nor the United States admitted intermarried whites to be *members of the Chickasaw nation*.

The following law was enacted by the Choctaw council in 1840:

*Be it enacted by the general council of the Choctaw nation assembled, that no white man shall be allowed to marry in this nation unless he has been a citizen (resident?) of the same for two years. \* \**

*And be it further enacted, that no white man, who shall marry a Choctaw woman shall have the disposal of her property without her consent; and any white man parting with his wife, without just provocation, shall forfeit and pay over to his wife such sum or sums as may be adjudged to her by the court for said breach of the marriage contract and be deprived of citizenship.*

By this statute the Choctaws virtually recognize the concession of limited citizenship to intermarried whites.

But they do not recognize in this citizenship any vested right. In the first place, although prior to the passage of an act relating to the property of married persons, approved Oct. 10, 1848, marriage transferred to the Choctaw husband all the wife's personal property in possession, it was nevertheless provided in the act of 1840, quoted above, that marriage should not transfer to the white husband of a Choctaw wife her property in possession. And, in the second place, if the white husband parted with his Choctaw wife, without just provocation, he was to be deprived of his limited citizenship, whatever it amounted to. It was not a vested right.

The following imperfect law was enacted by the Choctaw legislature in 1853 :

*Be it enacted by the general council of the Choctaw nation assembled,* That William Morrison, Thomas Morrison, Sarah Jane Morrison, Molly Redhead, Betsey Heart, Rebecca Heart, Philip Keggo, and infant child of Philip Keggo, Rosa Ayres, Betsey Ayres, Julian Ayres, Mary Ayres, Sophonia Ayres, and Sallie Ayres; and they are hereby declared naturalized citizens of the Choctaw Nation, invested with all the rights, privileges and immunities of naturalized citizens of the same.

In 1853, naturalized citizens of the Choctaw nation were not invested with all the rights of Choctaws. They had only the rights, privileges, and immunities of naturalized citizens. What the rights, privileges, and immunities of naturalized citizens were the record does not show.

The following are general provisions of the Chickasaw constitution of 1856 :

Section 8. Any person, other than a Chickasaw, having legally intermarried with a Chickasaw woman, shall participate in the Chickasaw annuities, but shall not be eligible to any office of trust in this nation. In like manner, a wife, other than a Chickasaw woman, having legally married a Chickasaw husband shall participate in the annuities of the Chickasaw tribe; provided, they are residents of this nation. This rule shall cease in case where a husband or a wife, other than Chickasaws, die or be separated from the bonds of matrimony. But such death or separation shall not affect the right of the children (born during such intermarriage) to participate in all the rights, privileges, and immunities of the Chickasaws.

Section 10. No retrospective payments shall be made out of the Chick-

asaw moneys to any person herein adopted, or which may be hereafter adopted under the constitution.

Section 11. The legislature shall have the power, by law, to admit or adopt any person to citizenship in this nation except a negro, or descendant of a negro; provided, however, that such an admission, or adoption, shall not give a right, further than to settle and remain in the nation, and to be subject to its laws.

By the foregoing constitutional provision only a single right of citizenship was secured to the intermarried white. That right amounted to nothing. It was the right to participate in the Chickasaw annuities. The only annuities to which the Chickasaws are, or ever have been, entitled, are the annuities of \$3,000 per annum, secured by the treaty of July 18, 1794. They amount to only seventy-five cents per annum for each Chickasaw. These trifling sums have not been distributed *per capita*. The whole amount has been used to defray the expenses of the tribal government. But even this diminutive right was held not to be a vested right. It was to be taken away, when the marriage relation between a white person and a Chickasaw should be terminated, either by death or by divorce. Moreover these intermarried whites were expressly denied the right to hold any office of trust, or profit, in the nation, and it was expressly provided that no admission or adoption "to citizenship" should "give a right further than to settle in the nation, and to be subject to its laws."

Now whatever may, or may not, have been the fate of the foregoing constitutional and statutory provisions after the treaty of 1866 took effect, it is, of course, certain that prior to the date of that treaty they were valid and operative. After the date of that treaty the claim of these intermarried whites was invalidated by the 43d article of that treaty.

The following is article 43 of the treaty of 1866 :

Article 43. The United States promise and agree, that no white person, except officers, agents, and employes of the government, and of any internal improvement company, or persons traveling through or temporarily

sojourning in the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations, into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons, who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement, as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations.

It is provided, in the foregoing article that, with certain specified exceptions, no white person shall be permitted to go into the Choctaw and Chickasaw territory, unless formally incorporated and naturalized, by the joint action of the authorities of both nations, into one of the said nations, according to their laws, customs, or usages. The specified exceptions are (1) officers, agents and employes of the government, and of any internal improvement company; (2) persons traveling through or temporarily sojourning in the said nations, or either of them; (3) parties adopted before the date of the treaty; (4) employes, who are teachers, mechanics, or persons skilled in agriculture.

It will be observed that these exceptions do not, in terms, include white persons, who have married white "members of the nation," whether before, or since, the date of the treaty. It will be observed also that the *adopted* citizen is distinguished from the intermarried citizen, in article 38 of the treaty of 1866, and that this distinction has been constantly recognized, not only by the Chickasaw government, but also by the government of the United States. There is no substantial basis for a claim that this distinction has been ignored in article 43. The assumption that the words "*heretofore adopted*," as used in article 43, mean *heretofore intermarried*, is not warranted by anything in the treaty itself, or in Chickasaw legislation, or in the transactions between the Chick-



asaws and the United States. If such be not their meaning, it follows, of course, that no white person, married to a Chickasaw, can be a member of the Chickasaw nation in all respects as though he were a Chickasaw, or even be invested with a restricted membership in that nation, unless married in accordance with Chickasaw law or usage sanctioned by general or special Choctaw legislation, or usage, whether married before, or after, the date of the treaty of 1866.

It may, however, be urged that the proviso of article 43 in favor of white persons adopted before the date of the treaty, although not in terms embracing intermarriages prior in date to that treaty, ought to be construed to embrace them. Let this be assumed for the purposes of the argument.

If, now, we look at the face of article 38, and at the face of article 43, we discover an apparent inconsistency between the two stipulations. According to article 38, the white person who married a Chickasaw and resided in the Chickasaw nation, was to be "*deemed a member of the nation*," for some or all purposes. According to article 43, he was *not* to be permitted *to enter* the nation, unless incorporated into one of the two nations, by the joint action of the authorities of both. If, according to article 38, a white man who should, after the date of the treaty, marry a Chickasaw woman and reside in the Chickasaw nation, was to be *deemed a member* of the nation, he was nevertheless, by article 43, *excluded* from the nation, unless incorporated and naturalized therein by the joint action, of the authorities of both nations. If, by article 38, a white person, adopted after the date of the treaty, was to be *deemed a member* of the nation, article 43, nevertheless, *excluded* him from the nation, unless incorporated therein, by the joint action of the authorities of both nations.

How, then, are these repugnant provisions of the two articles to be reconciled? Only by so construing them that claimants of citizenship, by marriage or adoption subsequent to the treaty of 1866, shall not be deemed members of the nation, for any purpose, unless married or adopted according to the laws, customs, or usages of both nations.

An attempt is made to evade and practically nullify this 43d article of the treaty, by the following line of argument. It is contended that although embraced in a tripartite treaty, it was not itself a tri-partite stipulation, but was only a uni-lateral promise by the United States; that it did not affect the relations of the whites to the Chickasaws; that, while it did fix the relations of the United States to the Choctaws and Chickasaws on the one hand, and to the whites, on the other, it did not fix the relations between the Chickasaws or Choctaws and the whites, but left those relations subject to the provisions of article 38; that while it bound the United States not to permit these claimants to "go into said territory," it did not bind, or authorize, the Choctaws or Chickasaws not to permit them to "go in," and did not authorize the Choctaws or Chickasaws to insist that the United States should not permit them to do so; but, on the contrary, left the Choctaws and Chickasaws subject to the obligation, alleged to be imposed by article 38, not only to permit them to "go in," but to permit them to remain, and to invest them with all the rights of native citizens.

According to this mode of interpretation, a treaty which, in one article, imposes upon the first party an obligation not to permit a certain thing to be done, to the detriment of the second party, in another article, not only imposes upon the second party an obligation to refrain from insisting that the first party shall perform his promise, but

also imposes upon the second party an obligation to do the very thing, which the first party agrees not to permit to be done. That this article was intended by the parties to bind the Choctaws and Chickasaws, as well as the United States, is shown by those clauses, which relieve the Choctaws and Chickasaws from its operations, as to teachers, mechanics, skilled agriculturists, and works of internal improvement. These exceptions unmistakably indicate the general intent of the parties.

Claimants of citizenship, by virtue of intermarriage or adoption since 1866, must have proved that they were adopted or married in accordance with the laws, customs, or usages of both nations. The burden of proof was on them. This is not a harsh or unnecessary requirement; for every Choctaw and Chickasaw citizen will be entitled to an allotment of an equal share in all the lands of the two nations. To permit one nation to introduce additional shareholders, without the consent of the other, would be manifestly unjust. It would be injurious to the Chickasaws, as well as to the Choctaws, to admit a swarm of claimants, upon a mere presumption that their adoption, or marriages, had been consummated in conformity with the requirements of article 43 of the treaty of 1866. It is no hardship on a claimant to require proof of his right to the allotment of a share in the Choctaw and Chickasaw lands. This necessary proof has been furnished in very few of the Chickasaw citizenship cases. It results that few of the claimants of this class can be enrolled as Chickasaw citizens entitled to allotments of Choctaw and Chickasaw lands.

By the 5th section of the act of the Choctaw council, approved Nov. 9, 1875, it is provided as follows:

Should any man or woman, a citizen of the United States, or of any foreign country, become a citizen of the Choctaw Nation by intermar-

riage as herein provided, and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship; unless he or she shall marry a white man or woman, or person as the case may be, having no rights of Choctaw citizenship by blood, in that case all his or her rights acquired under the provisions of this act shall cease.

It is provided in the Chickasaw act of October 19, 1876, as follows :

Section 3. *Be it further enacted*, that no marriage heretofore solemnized, or which may hereafter be solemnized, between a citizen of the United States and a member of the Chickasaw nation, shall enable such citizen of the United States to confer any right or privilege, whatever, in this nation, by again marrying a citizen of the United States, upon such other citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation, and shall have heretofore abandoned her, or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all rights acquired by such marriage in this nation, and shall be liable to removal as an intruder from the limits thereof.

It is contended that these enactments are both repugnant to article 38 of the treaty of 1866, and therefore void. But this is a mistake. That article secures no rights whatever to white husbands of white women or to white wives of white men.

The following is one of the general provisions of the Chickasaw constitution of 1867 :

Sec. 7. All persons, other than Chickasaws, who have become citizens of this nation by marriage or adoption, and have been confirmed in all their rights as such by former conventions, and all such persons as aforesaid who have become citizens by adoption by the legislature, or by intermarriage with the Chickasaws, since the adoption of the constitution of August 18th, 1856, shall be entitled to all the rights, privileges, and immunities of native citizens. And all who may hereafter become citizens either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor

The foregoing provisions were, of course, subordinate to article 43 of the treaty of 1866. None of them can be valid, without the joint action of the Choctaw and Chickasaw authorities, except the single provision, which ratifies the adoption of citizens by the separate action of the Chickasaw legislature, before the date of the treaty of 1866. None of its provisions have been validated by the

joint action of the Choctaw and Chickasaw authorities. Moreover it contains no provision expressly, or by implication, securing the rights of citizenship to the white husband of a white wife, or to the white wife of a white husband, or to their white children, or to the surviving white husband of a Chickasaw wife after his subsequent marriage to a white woman.

The rights secured to intermarried whites, by the treaty of 1866, are not to be expanded beyond the limits fixed by the acquiescence of the three parties to the treaty. They embrace the right of the white person, who marries a Chickasaw or Choctaw, to enjoy, during the residence of the husband and wife in the nation, in the marriage relation, and, after the death of the Chickasaw or Choctaw, until a subsequent marriage to a white person, whatever benefits of citizenship are secured to intermarried whites by article 38 of the treaty of 1866. So far the Choctaws and Chickasaws have gone, since the date of the treaty of 1866, with the acquiescence of the United States. But they have gone no further. They have never consented that the white wife of the surviving husband of a Chickasaw woman should be invested with any of the rights of citizenship. They have never consented that the white husband of the white widow of a Chickasaw should be invested with any of the rights of citizenship. Nor have they ever consented that the white children of white parents should be invested with any of those rights. More than that, they have never consented that the surviving white husband or white wife of a Chickasaw should, after a subsequent marriage to a white person, enjoy any rights in the Chickasaw nation beyond the right to reside in the nation, exempt from liability to eviction as an intruder.

*Vested property rights.*

Again, the applicants contend that the treaties of 1855 and 1866 secured to the white man, when he married a Chickasaw woman, a vested right to a share in all the lands of the Chickasaws and Choctaws; that when, after the death of his Chickasaw wife, he married a white woman, he conferred upon her full Chickasaw citizenship, and, therefore, she acquired a vested right to a share in all the lands of the Chickasaws and Choctaws; and that, when white children were born of this second marriage, they acquired Chickasaw citizenship and vested rights to share in all those lands.

It is contended that rights, confirmed by the judgments of the district court, will be destroyed or impaired if those judgments shall be reversed. But the appellees have not, through those judgments, or otherwise, acquired, nor do they possess any vested property rights to lands or moneys of the Chickasaw nation. The lands, held in common by the Chickasaw and Choctaw nations, are the public property of those nations. The individual Chickasaws and Choctaws are not, as counsel asserts, tenants in common of those lands; nor do they hold those lands in any other form of individual ownership. Nor do the citizens of those nations hold, as individuals, the public moneys of the respective nations. This question was decided by the court of claims, in the opinion delivered January 9, 1899, in *Choctaw Nation et al. v. United States et al.*, p. 64, as follows:

It was not the object of the treaty of 1855 to recognize rights of private ownership or change the nature of the Indian title of occupancy into one of different character. That treaty on its face shows it was in settlement of the claims of the Chickasaws as against the Choctaws, and the lands covered by the guaranty were to be held in common thereafter by the two tribes instead of one; that is, each member of each tribe was to

have the same rights in the country of the two nations that the members of one tribe formerly had under the treaty of 1830, before the convention of 1837 between the two nations. The guaranty was intended to secure to two tribes in common what one tribe had before then enjoyed to itself alone. The land continued to be tribal land after this treaty as much as it had been before, in the sense that when it again became the subject of treaty with the United States the nations could only deal with it, and when they ceded it such cession by them extinguished the claims of the members absolutely.

The relation of the citizens of the Chickasaw and Choctaw nations, to the lands and moneys of those nations, is, so far as this point is concerned, practically the same as the relation of the citizens of the United States to the public lands and to the public moneys of the United States. All the citizens of the United States are equally interested in the public lands and moneys; but none of them are invested with individual ownership therein. Those lands and moneys are public property of the nation,—not in any sense nor for any purpose private property of the citizens. Precisely the same thing is true of the relation of the citizens of the Chickasaw and Choctaw nations to the lands and moneys of those nations. That relation is easily ascertained. The Choctaw treaty of October 18, 1820, contains the following clause:

Art. 2. For and in consideration of the foregoing cession on the part of the Choctaw nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said states, do hereby cede to said nation a tract of country west of the Mississippi river, situate between the Arkansas and Red river, bounded as follows, &c.

The act of May 28, 1830, contains the following provision:

Sec. 3. *And be it further enacted*, That in the making of any such exchange, or exchanges, it shall and may be lawful for the president solemnly to assure the *tribe*, or *nation*, with which the exchange was made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them; and, if they prefer it, the United States will cause a patent, or grant, to be made and executed to them for the same: Provided always that such lands shall revert to the United States, if the Indians become extinct, or abandon the same.

The treaty of September 20, 1830, contains the following stipulation :

Article 2. The United States, under a grant specially to be made by the president of the United States, shall cause to be conveyed to the Choctaw *nation* a tract of country, west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, &c.

The patent, granted by the president, March 23, 1842, contains the following clause :

Know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw *nation* the aforesaid tract of country, &c.

By the "convention and agreement" of January 17, 1837, the Chickasaw *nation* purchased, from the Choctaw nation, a part of the land acquired from the United States by the above-mentioned treaties and patent. The following is the stipulation :

Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country to be held on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw nation, &c.

The tract sold to the Chickasaws was carved out of the middle portion of the Choctaw country. It contains 4,650,935 acres. There remained to the Choctaws a tract of 6,668,000 acres east of the "Chickasaw district," and a tract of 7,713,239 acres west of that district ; these two Choctaw tracts amounting, in the aggregate, to 14,381,239 acres. The three tracts amounted, in the aggregate, to 19,032,174 acres. The Chickasaw tract was sold to the Chickasaw nation, not, as private property, by individual Choctaws, but, as public property, by the Choctaw nation. The effect of the sale was to make the Chickasaw nation the owner of the land sold.

In 1855, the authorities of the United States found it desirable to obtain a lease of the Choctaw tract of 7,713,-



239 acres west of the Chickasaw district, for the settlement of certain tribes of friendly Indians. But the lease of that tract would leave, to the Choctaw nation, only the tract east of the Chickasaw district. The result would be that, although the population of the Choctaw nation bore, to the population of the Chickasaw nation, the proportion of 3 to 1, and the proportion of the Choctaw to the Chickasaw land, before the lease of 1855, was that of  $14\frac{38}{100}$  to  $4\frac{65}{100}$ , or, approximately, 3 to 1, the lease of the western tract would leave the proportion, of the Choctaw to the Chickasaw land, that of 3 to 2. To obviate this manifest injustice, by securing to the Choctaw nation its due proportion of 3 to 1, in the lands not leased, the treaty of 1855 transformed the separate ownership of the two nations, in the three tracts, into ownership in common, and leased the western tract to the United States. The following is the language of the treaty of 1855 :

And pursuant to an act of congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole ; Provided, however, no part thereof shall ever be sold, without the consent of both tribes ; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

The result of these arrangements was to make the two nations owners in common of their whole territory, including the district subject to the lease, in the proportion which the population of one bore to that of the other. The "interests" of Chickasaw citizens in these lands are widely different from the rights which tenants in common hold in their lands. The tenant in common can convey, mortgage, or devise his property rights in the land. The Chickasaw can do neither of these things. The tenant in common can have partition. The Chickasaw can not. At the death of the tenant in common,

leaving children, his estate does not escheat ; it descends. At the death of the Chickasaw, leaving or not leaving children, his interest in the lands of the nation does not descend ; it merges in the common stock and escheats. It is, in this respect, like the interest of the citizen of the United States in the public lands. A deed, executed by all the tenants in common, conveys their land. A deed of Chickasaw land, executed by every Chickasaw, conveys nothing. If a tenant in common dies, leaving, say, five children, the interests of the five children are not, in the aggregate, five times the father's ; they are only equal to the father's. But if a Chickasaw has five children, their interests, whether he lives or dies, are, in the aggregate, five times as large as his own.

The contention that the act of congress, authorizing these appeals, destroys, or impairs vested rights of citizens by blood, is based upon the paragraph just quoted from article 1 of the treaty of June 22, 1855.

The claim that the law, authorizing these appeals, disturbs vested rights of citizens by marriage or adoption, is based upon the same stipulation coupled with article 38 of the treaty of April 28, 1866, of which the following is the text :

Art. 38. Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment, according to their laws in all respects as though he was a native Choctaw, or Chickasaw.

The case of citizens by blood is to be considered first. If these words, "so that every member of either tribe shall have an equal undivided interest in the whole," were applied to persons who, under treaties, constitutions, or laws, were permitted to convey, mortgage and devise their estates in lands,—whose children could take their lands by inherit-

ance, but, during the life of the father, could acquire no vested interest in lands held by him as tenant in common, these words, disconnected with other treaty stipulations, and unexplained by the context, might be construed to imply that such persons were to be invested with rights of private property in the land. But, inasmuch as they are, in fact, applied to persons who can not convey, mortgage, or devise,—whose children can not take by inheritance, but become at birth, each, invested with interests equal to that of the father, not because they are heirs of their father, but because they are constituent units in the body politic, these words aptly qualify interests, not in private, but in public property.

The words, "each and every citizen of the United States shall have an equal undivided interest in the whole of the public lands," would accurately characterize the relation of citizens of the United States to those lands. The words of the treaty mean that the Chickasaw holds his "interest" as an interest, not in private, but in public property,—not in his private capacity, but in his capacity as a part of the body politic. They mean that the two nations, made up of the aggregate of their respective members, are to hold the lands of both nations in common, but in shares proportionate to the numbers of their citizens respectively.

The treaty of 1855, on which the appellees base their contention that the individual Chickasaws have vested rights of property, in Choctaw and Chickasaw lands, was made between the United States and the Choctaw and Chickasaw *nations*. These nations were capable of making treaties. As we have seen, they have made many treaties with the United States. They were competent to sell and purchase lands. They had, as nations, sold land east of the Mississippi to the United States, and pur-

chased land west of the Mississippi from the United States. The Choctaw nation had sold an undivided interest in its lands to the Chickasaw nation. It is to-day in the power of those nations, acting in their corporate capacity, to sell their country to the United States. They can transfer, not only dominion over, but property in this land. In so doing, they will not take private property and dispose of it for public use, but will sell public property. To land in such a condition the individual Chickasaw can have no vested right excluding the power of congress to authorize appeals in these citizenship cases.

But is it contended that the Chickasaw has a vested right to the *use* of a separate portion of the common domain of the Choctaw and Chickasaw nations, and that, in this respect, his interest, in that common domain, differs from the interest of the citizen of the United States in the public lands of the nation? An analysis of the Chickasaw's interest will show that there is no difference, which can affect the issues involved in the pending appeals. The Choctaws and Chickasaws together number 20,000. They own more than 10,000,000 acres of land, exclusive of the leased district. An equal division, in severalty, would secure to each Chickasaw and Choctaw more than 500 acres. But if any member of either tribe should undertake to segregate a tract of 500 acres from the common stock, and appropriate it to his own use, he would undertake to appropriate to his own use that to which 19,999 others have rights identical with his own. Such an undertaking would resemble an undertaking by a citizen of the United States to secure the separate use of a part of the public lands. The treaty of 1855 does not secure to the individual Chickasaw the exclusive use of any separate parcel of the land of the Chickasaw and Choctaw nations. Their rights to such use are practically

squatter's rights, regulated, in a rude way, by statute. It is true that individual Chickasaws enjoy the exclusive use of separate tracts, some holding thousands of acres, others holding each less than a score. There is no equality of use.

While the individual Chickasaw has no treaty right to the use of any specific tract of the common domain, he has a treaty right to his share of the net usufruct of the entire territory of the two nations. But this is precisely the right which the citizen of the United States holds in relation to the public lands. In either case the benefit comes, not directly to the citizen, but to the nation, and, through the nation, to the citizen as a part of the body politic. A judicial determination that a person is a citizen of the Chickasaw nation, or a citizen of the United States, does not make his citizenship a vested property right in the public lands, or carry with it a vested property right in the public lands of the Chickasaw nation, or of the United States, such as to exclude a reversal of a judicial determination of a party's citizenship, on the ground that such reversal would *disturb vested property rights in the public lands*.

The law conferred upon the district judge no power to vest any property rights in anybody. It purported to authorize him to decide who were citizens; but it did not purport to authorize him to decide what rights the citizen possessed and thereby vest in him those rights. There are three classes of Chickasaw citizens,—citizens by blood, by marriage, and by adoption. The law purported to empower the judge to find as he did find that the three appellees in this case were citizens by marriage. But it did not authorize him to decide that the rights of the intermarried citizens were the same as those of the citizen by blood and by such decision vest in the intermarried

citizen all the property rights of the citizen by blood. Having found that the appellees were *citizens by marriage*, he proceeded to decree that they were *citizens*, and thereupon accorded to them "all the rights and privileges appertaining to such relation," meaning all the rights and privileges of citizens by blood. His decision that these persons had this or that right was a nullity. It vested no property right in either of the appellees. Their status so far as vested property rights are concerned is fixed not by Judge Townsend's decision,—not by his construction of the treaties and laws,—but by the treaties and laws themselves.

### III.

#### CITIZENS BY ADOPTION.

The following act of the Chickasaw legislature was approved by the governor of the nation, on the 17th of October, 1856 :

An act granting citizenship to the heirs of Wm. H. Bourland.

Sec. 1. *Be it enacted by the legislature of the Chickasaw nation*, That the right of citizenship is hereby granted to the following-named children and nephews of Wm. H. Bourland : Nancy, Amanda, Matilda, Gordentia and Run Hannah.

Approved October 17, 1856.

C. HARRIS,  
Governor.

The only right of citizenship, conferred by this act, was the right "to settle and remain in the nation and to be subject to its laws." For the act was subject to and limited by the following general provision of the Chickasaw constitution adopted August 18, 1856 :

Sec. 11. The legislature shall have power by law to admit, or adopt, any person to citizenship in this nation, except a negro or descendant of a negro : Provided, however, that such an admission, or adoption, shall not give a right further than to *settle and remain in the nation and to be subject to its laws*.

If, then, the act of October 17, 1856, were still in force,

its only effect would be to secure, to the beneficiaries of the act, the right "to settle and remain in the nation and to be subject to its laws." But this act, restricted in scope, as it was, by the constitution of August 18, 1856, was repealed by the following act of November 25, 1857:

An act repealing all the acts of 1856 which are not adopted:

*Be it enacted by the legislature of the Chickasaw nation,* That from and after the passage of this act all certified copies of the laws that were passed in the legislature of 1856, that are not adopted by the legislature of 1857, are hereby repealed.

Approved November 25, 1857.

C. HARRIS,  
Governor.

The facts, connected with the alleged adoption of Bourland's heirs, are set forth in the following affidavit:

INDIAN TERRITORY, )  
Chickasaw Nation. )

Bef. re me, the undersigned authority, on this day, personally appeared Overton Love, who, being by me duly sworn, on oath deposes and says:

That he is a Chickasaw Indian by blood, and emigrated from Mississippi to the Indian Territory in the year 1843; that he is 73 years of age; that he was the first Speaker of the House of Representatives of the first Legislature of the Chickasaw Nation, in 1856, and has been connected, more or less, with the public affairs of said Nation since that date; that he has filled the position of county judge, district judge, representative, senator, and delegate to Washington; that he, in 1856 and prior thereto and until his death, was intimately acquainted with William H. Bourland; that the said William H. Bourland, was a United States citizen, and the father of Nancy, Amanda, Matilda, and Gordentia, and the uncle of Reece Hannah; these were his children by his first wife, who was a United States citizen; that sometime in the fifties he married Caroline Willis, a Chickasaw citizen, who is yet living; that in the year 1856, at the first session of our legislature, William H. Bourland presented an application to the legislature, asking that these children be adopted under the constitution as it then existed, so that they might live with him while he lived in the Chickasaw nation,—the only object being that they might have the right of residence and not be ejected by the Chickasaw authorities. In accordance with his application, the act of October 17, 1856, was passed. Sometime during the year 1856, the laws of the Chickasaw nation not having been published became misplaced and lost; and at the session of the legislature in 1857, an act was passed repealing all the laws enacted in 1856, except those especially adopted by the legislature in 1857. The act adopting the children of William H. Bourland and his nephew Reece Hannah was among those repealed; and about that time said William H. Bourland having abandoned the idea of having them adopted, and setting up no claim that they had been adopted, left the Chickasaw nation and removed to Texas, where he afterwards died. I was intimately acquainted with the whole family; and after he removed to Texas his three daughters boarded at my house

and attended school. From that date, until after A. B. Roff had married Matilda Bourland and her death in Texas, I never heard of any claim being made that said children had been adopted. About that time A. B. Roff came to see me and to learn whether or not his first wife and her sister had been adopted, his object being to learn so that he could move over into the Chickasaw nation. I then informed him that they had not been adopted, except as stated above; but I told him that I thought that if he wanted to move in the Chickasaw nation, and would keep quiet, go on and attend to his business, that the Indians would not object to his staying in the Chickasaw nation. After that he moved over into the Chickasaw nation, and has continued to reside here ever since. I am personally acquainted with the fact that at no time, after the repeal of the law adopting said children, said law was published as such in any of the books containing the laws of the Chickasaw nation, until after the treaty of 1866 between the Chickasaw nation and the United States. When this treaty was made it became necessary for the Chickasaws to revise their laws and the constitution. A committee was appointed by the governor, to codify the laws and amend them, and have the same published; after which they were to be voted upon by the people for adoption or rejection. About 1866 this election was held. It then developed that this convention, or committee, had had published the old law adopting the Bourland heirs; and this among other laws was specially mentioned to be voted upon by the people for adoption or rejection. After the act adopting them was rejected by the people, the governor issued his proclamation declaring the result. This was the only act rejected; and, by some oversight, in 1876 when the laws were published again, it was again placed in the published laws. Of my own personal knowledge I know nothing further than to say that since about 1876, whenever the matter was agitated a little, it was by some manner suppressed. I will further state that Joseph Brown, who married Amanda Bourland, sister of Alva Roff's wife, in about 1870 or 1871, went to my uncle Judge Robert Love, and employed him to have his right established as an adopted citizen. Upon learning this fact, I went to him and then to Colonel Bourland, and told them that, if they insisted on doing this, that it would be my duty to tell what I knew about how they were adopted, and what I have stated above, but that, his being a friend of mine, if he kept quiet he could remain here, and I would say nothing. Whereupon no further action was taken by him. I further state that Joe McKinney, who married Gordenia, a sister of Alva Roff's wife, about the year 1880, moved into the Chickasaw nation, from Texas, and settled near me, as a neighbor; he frequently talked to me about his wife's right and I explained it fully to him; and, after living here about two years, he moved back to Texas. Since then I have known nothing further about him.

(Signed) OVERTON LOVE.

Subscribed and sworn to, before me, this the 2d day of October, A. D. 1896.

G. W. ADAMS,  
*Notary Public.*

The clerk to whom, as master, this cause was referred by the district judge, decided that the act of November 25, 1857, did not repeal the act of October 17, 1856. He



based his decision upon the following grounds: (1) That it did not repeal any laws, but only repealed copies of laws; and (2) that it did not repeal the act of October 17, 1856, because that act was not "expressly mentioned," in the repealing act. The master was mistaken on both points. So was the judge who adopted his reasoning and his decision. The law, enacted November 25, 1857, repealed all the laws which had been enacted by the legislature of 1856, and were not adopted by the legislature of 1857. The laws, so repealed, included the act which conferred upon the children and nephews of Wm. H. Bourland the right "to settle and remain in the nation and to be subject to its laws."

In the year 1857, when this repealing act was passed, the constitutional government of the Chickasaws was one year of age. Their legislature had assembled for the second time. Their law-makers had experimented in legislation only once. To all of them the methods, forms, and language of legislation were new. To most of them the English language, in which they framed their laws, was an unknown tongue. They had not yet passed the stage of semi-civilization. They were not familiar with the maxims of Cooley, Sedgwick, and Dwarris, or with the master's rules for English composition.

The laws which had been enacted at the previous session of the legislature had never been printed, but existed only in certified manuscripts called certified copies. At that time the authoritative copies of the laws of the United States, which were deposited in the state department, were not printed copies, but manuscript copies, certified by the secretary of state. The legislature employed, in the act of 1857, phraseology which, understood as the master and district judge understood it, if not absolutely devoid of sense, had a meaning super-

latively absurd. Their decision was that the scope and effect of the act were, and were intended to be, not to repeal the *laws* enacted in 1856, but only to repeal certified *copies* of those laws. But the Chickasaws neither intended nor achieved any such absurdity. They employed language which, unskilled and bungling as it is, must compel the common sense of every intelligent man, whether lawyer or layman, to recognize in the act an intention and a successful attempt to repeal, not copies of the laws of 1856, but the laws themselves.

The master says :

If, as a matter of fact, the legislature did intend to repeal all former statutes, the language employed does not convey to the legal mind the faintest semblance of such an intention.

The master was mistaken. The "*legal mind*" is not separated from common sense by so wide a gulf. The legal mind, of ordinary intelligence, if not the unfortunate victim of a foregone conclusion, sees at a glance, as common sense sees at a glance, that these Indians, by the use of this awkward phraseology, in a tongue but little known to them, intended, not to repeal *copies*, but to repeal *laws*. The "*legal mind*" and common sense, instead of looking at *particular words* in a crudely phrased Chickasaw law enacted in 1857 for an absurd, not to say impossible, meaning, will look to *all its parts*—to its whole *scope, object, and effect*—for a rational meaning of the law.

The master must have overlooked the title of the repealing act of 1857. That title is not skilfully framed ; but is easily understood.

An act repealing all the acts of 1856 which are not adopted.

The law prescribing the use to be made, by United States courts, of the title of a statute, in ascertaining the scope of such statute, has been expounded by the Su-

preme Court. In *United States v. Fisher*, 2 Cranch, 358, 386, Chief Justice Marshall, delivering the opinion of the court, said :

On the influence which the title ought to have, in construing the enacting clauses, much has been said ; and yet it is not easy to discern the difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute ; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived ; and, in such case, the title claims a degree of notice, and will have its due share of consideration.

The rule stated by Chief Justice Marshall, which is based upon solid ground of principle, had already been recognized by the highest English authorities. In the great case of *Stradling v. Morgan*, Plowden 203, the question was whether the general word "receivers," used in the body of an act entitled "An act for the true answering of the King's revenue," extended to *all receivers*, or was restricted to the *King's receivers*. The court held that it was restricted to the King's receivers and ministers, and said :

Against them (the King's receivers) only was the act intended to be made ; which may be collected from the words of the act in other branches, for the stile (title) of the act is "An Act for the true answering of the King's revenues," so that the stile (title) signifies the scope of the act to be touching the matters of the King and his ministers.

In the *King v. Cartwright*, 4 Term Reports 490, the question was whether the provision of 9 Geo. 2, c. 35, s. 26, was, or was not, restricted to assaults on officers *while acting in their official capacity*. The following was the title of the act :

An act for indemnifying persons who have been guilty of offenses against the laws made for securing the revenues of customs and excise, and for enforcing those laws for the future.

Mr. Justice Buller held that "the intention of the legislature might be collected from other parts of the act,

which was made for the sake of the revenue, *as its title imported.*"

Dwarris (p. 502) says :

In the *King v. George Marks and others*, 3 East 160, where it was held that the unlawful administering, by any associated body of men, of an oath to any person, not to reveal or discover such unlawful combination, etc., is felony, within 37 Geo. 3, c. 123, though the object of such association was to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition, the words of the title were relied upon, which is generally against the administering or taking of unlawful oaths.

The following are the precise words of the title of this act : "An Act for more effectually preventing the administering or taking of unlawful oaths." In *Rex v. Inhabitants of Gweunap*, 5 Term Reports, 135, Grose, J., said : "If we read the titles and preambles of the three acts (which are in *pari materia*), there can be no doubt." As we have seen, the title of the repealing act of 1857 is "An Act repealing all the *Acts* of 1856, which are not adopted." A scrutiny of this title, in connection with the other parts of the act, shows the claim that the intention of the legislature was to repeal, not *acts*, but merely *copies*, to have neither validity nor plausibility.

Not only does the judge disregard the legitimate bearing of the title of this act on the question of its import ; but he also disregards many well established canons of interpretation applicable to the case. In *Oates v. National Bank*, 100 U. S. 239, 244, the law is stated by the supreme court of the United States as follows :

The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the letter of the statute, or to technical rules of construction. *Wilkinson vs. Leland*, 2 Pet. 627 ; *Sedgwick, Const. and Stat. Constr.* 196. And we should disregard any construction that would lead to absurd consequences. *United States vs. Kirby*, 7 Wall. 482. We ought rather, adopting the language of Lord Hale, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the law-making power, when thus expressed. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter ; and a thing which is within the letter of the statute is not within the

statute unless it be within the meaning of the makers." *Suckley vs. Furse*, 15 Johns (N. Y.), 338; *People vs. Utica Ins. Co.* id 357, 380.

The second ground for the decision that the act of 1856 was not repealed by the act of 1857 is stated as follows :

If the legislature, in plain terms, without designating the statute adopting the Bourland heirs, had have passed an act repealing all former statutes, it would not have had the effect of repealing the Bourland heirs act, unless the statute itself had expressly mentioned this statute.

In maintenance of this proposition the master says :

There exist many distinctions between statutes of general and local application ; and one is that a statute of local application is never repealed, "except upon the most unequivocal manifestation of intent to that effect." Cooley on Constitutional Limitations, p. 183. That the statute adopting the Bourland heirs is one only of local application cannot be denied.

This conclusion is wholly erroneous, and there is nothing in Judge Cooley's work which supports or tends to support it. The proposition that when a legislature, upon the enactment of a body of laws, repeals, in plain terms, all prior statutes, it does not repeal any prior statute of local application, would seem to be too obviously erroneous to require serious refutation. Judge Cooley gives no countenance to any such proposition. On page 185 of the fourth edition of his work on "Constitutional Limitations" will be found the passage to which the master refers. It occurs in no earlier edition of the work. He says :

But *repeals by implication* are not favored ; and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent of that effect.

Now an *express repeal* and a *repeal by implication* are two very different forms of legislation. A repeal by implication occurs when the provisions of the later act are repugnant to those of the earlier act, but the later act contains no clause expressly repealing such provisions.

An express repeal, on the other hand, occurs when the later act contains a clause which, in terms, repeals the earlier act. Judge Cooley says that, in order to effectuate a repeal *by implication*, the repugnancy between the later act and the earlier act should be "very clear," and especially ought the repugnancy to be very clear between a later general law and an earlier law of local application. He does not assert that a later statute, *expressly and in plain terms* repealing all prior statutes, will not repeal a prior statute of local application, unless the prior statute is particularly mentioned in the repealing act. His language, in the paragraph cited, refers not to express repeals, but to repeals by implication. In order to correctly understand the scope of his statement it will be necessary to examine the authorities upon which he bases it. He cites six cases, viz: *Cass v. Dillon*, 2 Ohio N. S. 607; *Fosdick v. Perryburg*, 14 Ohio N. S. 473, 479; *Clark v. Davenport*, 14 Iowa, 494; *Covington v. East St. Louis*, 78 Ills. 548, 550; *Oleson v. Railway Co.*, 36 Wis. 383, 388; *People v. Quigg*, 59 N. Y. 83, 88.

Upon an examination of these cases it will be found that they furnish not the slightest authority for the decision that "if the legislature, in plain terms, without designating the statute adopting the Bourland heirs, had have passed an act repealing all former statutes, it would not have had the effect of repealing the Bourland heirs act, unless the statute itself had expressly mentioned this statute."

The appellees also base their claim of citizenship upon the following general provision of the Chickasaw constitution as amended in 1867:

Sec. 7. All persons, other than Chickasaws, who have become citizens of this nation, by marriage or adoption, and have been confirmed in all their rights, as such, by former conventions; and all such persons, as aforesaid, who have become citizens, by adoption of the legislature, or

by intermarriage with the Chickasaws, since the adoption of the constitution of August 18, A. D. 1856, shall be entitled to all rights, privileges, and immunities of native citizens. And all who may hereafter become citizens, either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor.

It is contended that this section of the Chickasaw constitution, added to Matilda Bourland's right to "settle and remain in the nation, and to be subject to its laws," the further right to share equally with the Chickasaws in the lands of the Choctaws and Chickasaws, and in all the other rights and privileges of native citizens. But I submit that this provision conferred no rights whatever upon the persons named in the act of October 17, 1856, for the following reasons:

1. That act, which was explained and limited by the constitution of August 18, 1856, conferred upon those persons no "right of citizenship" except the right "to settle and remain in the nation and to be subject to its laws." If it had not been so explained and limited, but had conferred citizenship, in general terms, and had never been repealed, it might be plausibly claimed that this constitutional amendment secured to these persons all the rights and privileges of native citizens, including the right to share in all the lands of the Choctaws and Chickasaws. But the act of 1856, so explained and limited, conferred only the right to settle and remain in the nation and to be subject to its laws. It did not confer full citizenship, but only one of the narrowest privileges of citizenship. It conferred no property rights whatever. But it was full citizenship to which the constitutional amendment of 1867 accorded all the rights, privileges, and immunities of native citizens.

2. The act of 1856 was repealed in 1859. It had been dead ten years when the constitutional amendment of

1866 was adopted. That amendment did not restore it to life.

3. After the adoption of article 43 of the treaty of April 28, 1866, it was not in the power of the Chickasaws, without the co-operation of the Choctaws, to adopt citizens into the Chickasaw nation, or to confer upon white persons any rights of citizenship whatever.

No treaty between the Choctaws and Chickasaws and the United States ever expressly authorized, in advance, the admission of white persons to full membership in the Chickasaw nation, by separate action of the Chickasaw authorities. There was, however, no obstacle, or objection, to the naturalization of white persons, by the separate, independent action of the Chickasaws, before the making of the convention, which constituted the Choctaws and Chickasaws owners, in common, of all the lands in both countries. That convention was signed, at Doaksville, on the 17th day of January, 1837, and was approved by President Van Buren, on the 24th of March, 1837. Prior to that date the property of the two nations, in both lands and moneys, was entirely separate and distinct.

But after the two nations became the owners, in common, of the country which they occupied, the naturalization of white persons by the independent action of either nation would have been in conflict with the rules of public law applicable to this new relation of the two nations. By such independent naturalization, the Chickasaws might have so augmented their membership that the citizens of their nation would have numbered three times, instead of one-third, as many as the citizens of the Choctaw nation. By that device it would have been possible for the Chickasaws to reduce the Choctaw ownership of the common country, which is now three-fourths of the whole, to one-fourth of the whole. In the absence of treaty



stipulations on the subject, the principles of public law applicable to the case would have forbidden and invalidated any such attempt, by one nation, to wrong the other. But, this wrong was also expressly interdicted by the treaty of April 28, 1866. Article 43 of that treaty contains the following provision :

No white person \* \* \* shall be permitted to go into said Territory, unless formally incorporated and naturalized, by the joint action of the authorities of both nations, into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article shall not be construed to affect parties heretofore adopted.

Now, while the parties to this treaty do not, in terms, declare that *full membership*, theretofore granted by one nation, without the concurrence of the other, should be thenceforth held valid, it may be plausibly contended that the stipulation had that effect. It may be plausibly claimed, therefore, that all white persons previously admitted to *full membership* in the Chickasaw nation, by the Chickasaw authorities, without the concurrence of the Choctaws, even after the date of the convention of January 17, 1837, were thereafter entitled to equal undivided interests, in common, in the lands of the Choctaws.

But this retroactive effect of the treaty of 1866 could only extend to such white persons as had been previously admitted to *full membership* in the nation. Its effect was not to declare that a white person, admitted to *limited membership* in the Chickasaw nation, by a Chickasaw statute, which, in terms, expressly excluded all rights of property, should, nevertheless, be deemed a full member of the nation, invested with the ownership of a share in the Choctaw and Chickasaw lands equal to that held by each Choctaw and Chickasaw. Its effect was not to declare that Matilda Bourland, who was admitted to *limited membership* in the Chickasaw nation, under a constitutional provision that her admission should "not give a

right, further than to settle and remain in the nation, and to be subject to its laws," should, by its retroactive operation, be transformed into a "full member" of the nation, and invested with all the rights and privileges of full membership.

Article 43 of the treaty of 1866 did not, of itself, add anything to the right conferred upon Matilda Bourland by the act of October 17, 1856, "to settle and remain in the nation, and to be subject to its laws." Nor did it authorize the Chickasaws, by either a constitutional or a statutory provision, without the concurrence of the Choctaws, to make any addition to the right so conferred. After the adoption of article 43, it would have been competent for the Choctaw and Chickasaw authorities, acting jointly, to add to the rights conferred by the act of October 17, 1856, if that act had not been repealed, or, after its repeal, to grant *de novo* to Matilda Bourland all the rights of citizenship by blood. But no such joint action was had by the authorities of the two nations.

The seventh "general provision" of the Chickasaw constitution, as amended in 1867, after the making of the treaty of 1866, was, of course, subordinate to article 43 of that treaty. It was adopted by the Chickasaws, without the concurrence of the Choctaws, and was, therefore, incapable of adding anything to the right originally conferred by the act of October 17, 1856, or of conferring *de novo* any right upon Matilda Bourland, or of empowering the Chickasaw legislature, acting alone, to do either of these things.

4. Article 38 of the treaty of 1866, even though it were exempt from the effect of article 43, would impart no validity to transfers, to white men, of interests in Choctaw or Chickasaw lands, by the Chickasaws alone, without the concurrence of the Choctaws. It certainly

did not secure full membership in the Chickasaw nation, to white persons previously admitted to merely *limited* membership by the Chickasaws acting separately; nor to white persons admitted by a Chickasaw statute, which was subordinate to a constitution restricting the right of membership, by legislative adoption, to the "right to settle and remain in the nation, and to be subject to its laws."

Nor can it be successfully contended that article 26 of the treaty of 1866 invested Matilda Bourland with all the rights of native Chickasaws. The following is article 26:

Article 26. The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens, by adoption or intermarriage, of either of said nations, or who may hereafter become such.

This article would have no effect, even if it could override article 43 of the same treaty. The right herein referred to was merely the right to a quarter-section of land, given by the fifteenth article of the treaty. But, by the eleventh article, that right was subjected to the condition that the Choctaw and Chickasaw people should, "through their respective councils, agree to the survey and dividing of their lands, on the system of the United States." This condition was not complied with; and, therefore, no right whatever was conferred by article 15, or by article 26.

The first article of the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw nations, contains the following paragraph:

And, pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole. Provided, however, no part shall ever be sold without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

Is it claimed that this article invested Matilda Bourland with an interest in the Choctaw and Chickasaw lands? The answer is obvious. This article secured such interests, not to white persons, who had merely been permitted to "settle and remain in the nation, and be subject to its laws," but only to white persons, who had been admitted to full membership in the tribe.

#### IV.

##### JUDGMENTS VOID FOR WANT OF JURISDICTION.

The judgments rendered in this case by the "Commission to the Five Civilized Tribes," known as the Dawes Commission, and by the district court in the Chickasaw nation were both void for want of jurisdiction.

All the powers possessed by the United States, except such as may have been acquired by treaties with other nations, are inherent powers of sovereignty, recognized and secured by the law of nations. Many of them are enumerated, regulated, and distributed among the different departments of the government, by the constitution; but none are derived from it. The constitution is the creature, not the creator, of the sovereign state. I will assume, for the purposes of the argument merely, that these inherent powers include the power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations; and that the possession of this power results from the paramount dominion held by the United States over all the territories within the exterior boundaries of the nation. But this power, if vested in the United States, is not included among those distributed, by the constitution, among the three departments of the government; nor is its exercise "necessary

and proper" for carrying into execution any of those powers. It is included among the "reserved powers." Its exercise has never been intrusted to congress, or to any other department of the government. It is reserved, not to the states, but to the people.

The constitutional provision that, "congress shall have power to regulate commerce with the Indian tribes," does not confer upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations. This will be plainly apparent, when we examine the text of the constitution, and consider the relations which, at the time of its adoption, existed between the United States and those nations. The following are the words of the constitution :

The congress shall have power,—3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Looking at the words alone, we see, at once, that the regulation of commerce with foreign nations, or among the several states, or with the Indian tribes, has no possible connection with the determination of questions of citizenship in foreign nations, or in the states, or in the Indian tribes. We see, too, that, if these words were effectual to authorize congress to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, they would also authorize congress to invest such tribunals with jurisdiction to determine who are citizens of the several states and of foreign nations.

The reason why foreign nations and the Indian tribes are placed in the same category, in this clause of the constitution, is readily found. At the time of the adoption of the federal constitution, the relations between the United States and the Indian nations were acknowledged, by the United States, to be relations between treaty-making

powers. Treaties were made between Great Britain and the Chickasaws and Choctaws, during the colonial period ; and twenty-three treaties have, from time to time, been made with those nations, by the United States. They were regarded by the United States as *nations*,—not, indeed, as nations wholly independent of the United States,—but as nations capable of making treaties with the United States. Their relations to the United States, at the time of the adoption of the constitution, as acknowledged by the United States, have been accurately defined in the opinions of the supreme court. In *Worcester v. Georgia*, 6 Pet. 515, 547, 557, 559, Chief Justice Marshall, delivering the opinion of the court, said :

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take : but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies ; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only. \* \*

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians : which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged, but guaranteed, by the United States. \* \*

The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected, in our diplomatic and legislative proceedings, by ourselves, each having a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

In *Cherokee Nation v. Georgia*, 5 Pet. 1, 15, Chief Justice Marshall said :

They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

We have, then, no difficulty in understanding why the power to regulate commerce with the Indian tribes and the power to regulate commerce with foreign nations were placed on the same footing, in this paragraph of the constitution. It becomes clear, too, that the apparent effect of this clause is its real effect. It becomes clear that, if this provision empowers congress to invest tribunals, of its own creation, like the Dawes Commission, or the Chickasaw district court, with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, it also confers upon congress the power to invest tribunals, of its own creation, with jurisdiction to determine who are citizens of France and of Mexico, and who are British, German, or Russian subjects.

This would be all different if the constitution had invested congress with power, over the Chickasaw and Choctaw nations, broad enough, in scope, to include the regulation of their citizenship, as well as of their commerce with the United States. For then the principle established by the supreme court, in the case of *The American Ins. Co. v. Canter*, 1 Pet. 513, soon to be considered, would have been applicable to this case. Then it would have become competent for congress to invade the Choctaw and Chickasaw nations, and to do there what it could not do in one of the states,—that is to say,—to invest with judicial powers a tribunal, whose judges did not hold office during good behavior,—a mere “legislative court,” not a component part of the constitutional judi-

ciary of the United States. Then the power to invest the Dawes Commission, and the district courts in the Chickasaw nation, with jurisdiction of these citizenship cases, would have been "necessary and proper for carrying into execution" a power expressly conferred upon congress by the constitution.

In *American Ins. Co. v. Canter*, 1 Pet. 513, 546, Chief Justice Marshall, delivering the opinion of the court, said :

It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish." Hence it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior court of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government, or in virtue of that clause, which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction, with which they are invested, is not a part of that judicial power which is defined in the third article of the constitution, but is conferred by congress, in the execution of those general powers, which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised, in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

In this case of *The American Ins. Co. v. Canter*, the necessary power over the territories having been conferred upon congress, by the constitution, the question was, whether it was competent for congress to employ, in the execution of that power, a court, which was not a constitutional court, but to use the words of the chief justice, was a mere "legislative court." That question was de-



cided in the affirmative. And if the constitution had conferred upon congress power over the Chickasaw and Choctaw nations, as broad as that conferred upon congress over the territories, the principles established in that case would uphold the jurisdiction of the Dawes Commission and of the Chickasaw district court, in these citizenship cases. But the constitution has not conferred on congress such power over the Chickasaw and Choctaw nations.

The power to invest tribunals with jurisdiction to determine who are citizens of the Chickasaw and Choctaw nations, has not been entrusted expressly or by implication to any department of the government of the United States. It is reserved to the people; and, until the people shall, by constitutional amendment, or otherwise, confer that power upon congress, it cannot be exercised by congress. It follows that, the judgments of the Dawes Commission and of the district court are void, for want of jurisdiction.

Is it contended that, congress has acquired the power to invest tribunals, of its own creation, with jurisdiction of these citizenship cases through treaties with the Chickasaws and Choctaws? The answer to this claim is four-fold. No treaty, between the United States and the Chickasaws or Choctaws, confers, or purports to confer, any such power. But if a treaty conferred this power upon the *United States*, it would, for reasons already explained, be incompetent for congress to exercise the power, without authority from the people, granted by an amendment of the constitution, or otherwise. If a treaty purported to confer this power upon *congress* specifically, it would not be competent for congress to exercise the power, without authority from the people. But then, the Chickasaw nation cannot, by stipulation, confer upon the congress, or the courts, of the United States, powers, or jurisdiction, interdicted by the constitution. The constitution of the

United States cannot be altered by a treaty with the Chickasaw nation, any more than by an act of the Chickasaw legislature.

## V.

## INJURIOUS CHARACTER OF THE JUDGMENTS.

The following examples will illustrate the character of the judgments of the district court.

In No. 473 the district judge decided that, by virtue of the first article of the treaty of 1855, and the thirty-eighth article of the treaty of 1866, the white man A, who married a Chickasaw woman B, became at once invested with Chickasaw citizenship, not merely for jurisdictional purposes, but to all intents and purposes, and therefore acquired all the rights and privileges appertaining to Chickasaw citizenship. He decided, also, that if A, after the death of his Chickasaw wife B, married a white woman C, and white children were born of this second marriage, the white wife C and her white children all became Chickasaw citizens, holding the same vested rights. And he decided, further, that if, after the death of the white husband A, his white widow C married a second white husband D, and white children were born of this third marriage, the white man D and all his children acquired the same vested rights. And finally he decided that if the white children of these several marriages themselves married white persons, those white persons and their white children all acquired the same vested rights. In accordance with these decisions he held, in twenty-six of the pending cases, that seventy-five white persons, who were husbands of white wives, wives of white husbands, or children of white parents, were Chickasaw citizens, and that twenty-six white men, who had been husbands of Chickasaw women,

but, after their Chickasaw wives had died or been divorced, had married white women, were entitled to citizenship and acquired the same vested rights. By this ingenious process of devolution one hundred and one names were added to the roll of Chickasaw citizens.

In my brief, herewith filed, relating to the general questions involved in these citizenship cases, I have attempted to show that not one of those persons was entitled to enrollment.

By an act of the Chickasaw legislature, passed in 1856, "the right of citizenship" was granted to five white girls. The constitution, then in force, prohibited the legislature from granting any right of citizenship "further than" the right "to settle and remain in the nation and to be subject to its laws." The act was repealed in 1857, but was afterwards, by mistake, printed in compilations of the Chickasaw laws. The testimony of Judge Overton Love, on this subject, in No. 486, will be found to be "interesting reading." The district court, overruling the Dawes Commission, has, in Nos. 469, 477 and 486, enrolled, as citizens entitled to all the rights and privileges of Chickasaw citizenship, thirty-two white persons, descendants of those white girls, and husbands, or wives, of their descendants.

In the single case of *The Chickasaw Nation, Appellant, v. Wm. Burch et al.*, No. 517, eighty-three persons, apparently without the slightest trace of Indian blood, applied to the Dawes Commission for enrollment as citizens of the Chickasaw nation. Some of them claimed enrollment on the ground that they were descendants of a woman alleged to have been a Chickasaw, and to have lived in the state of Mississippi, near the close of the eighteenth century. The others claimed as husbands, or wives, of her descendants. The evidence produced, in maintenance of

their claims, largely hearsay, was too nebulous and flimsy to warrant a judgment even in Solon Shingle's "first-class cow case;" and they were all rejected by the Dawes Commission. But the district judge reversed the decision of that Commission, and adjudged them all to be citizens, adding eighty-three names to the roll of those entitled to share in the lands of the Choctaws and Chickasaws.

In No. 472, the clerk, acting as master, reported as follows :

John Calvin Hill is a brother of Evans Hill, and a lineal descendant of Charles Matlock, a Chickasaw Indian, who lived and died in the state of Tennessee. While Charlie Matlock was a Chickasaw Indian, there is no proof to show that he, or his descendants, with the exception of Evans Hill a brother of the applicant, had any connection with the Chickasaw tribe of Indians. John B. Hill many years ago emigrated from the state of Tennessee to the state of Texas, where he now resides. Both he and his prolific family are citizens of the United States; that they vote and exercise all other rights of citizenship of the United States, and have their domicile in the state of Texas. Under the law, as I believe it to be, if they had resided in the Indian Territory and asserted their rights to citizenship, they would have been, according to the technical rule, and no other, entitled to enrollment. But they are resident citizens of Texas, and have property and homes in the state, and, according to the fair rules of justice, they are no more entitled to citizenship.

The case was subsequently referred to a different master, who reported that Charlie Matlock was a "quarter breed Chickasaw," and that none of the applicants ever resided in the Indian Territory before they filed their applications. The Dawes Commission had rejected them all; but the district judge enrolled fifty-four, some as descendants of Matlock, and the others as husbands or wives of his descendants.

In No. 476 the master reports that "the proof of the applicants amounts to little more, if any, than a mere family tradition of Indian blood." He recommended the rejection of all the applicants. They had all been rejected by the Dawes Commission. But the case was referred to another master, who reported as follows :

I am of opinion, from the testimony of Simson and Wolfe, and from the testimony of the family tradition, that all the applicants herein are

the legal descendants of the said Nancy Frazier, who was a Chickasaw Indian, except the said Elizabeth McDuffie, S. M. Crawford, George Jarvis, and Wm. M. McCartey, who are intermarried citizens, and that they are each and all of them entitled to enrolment.

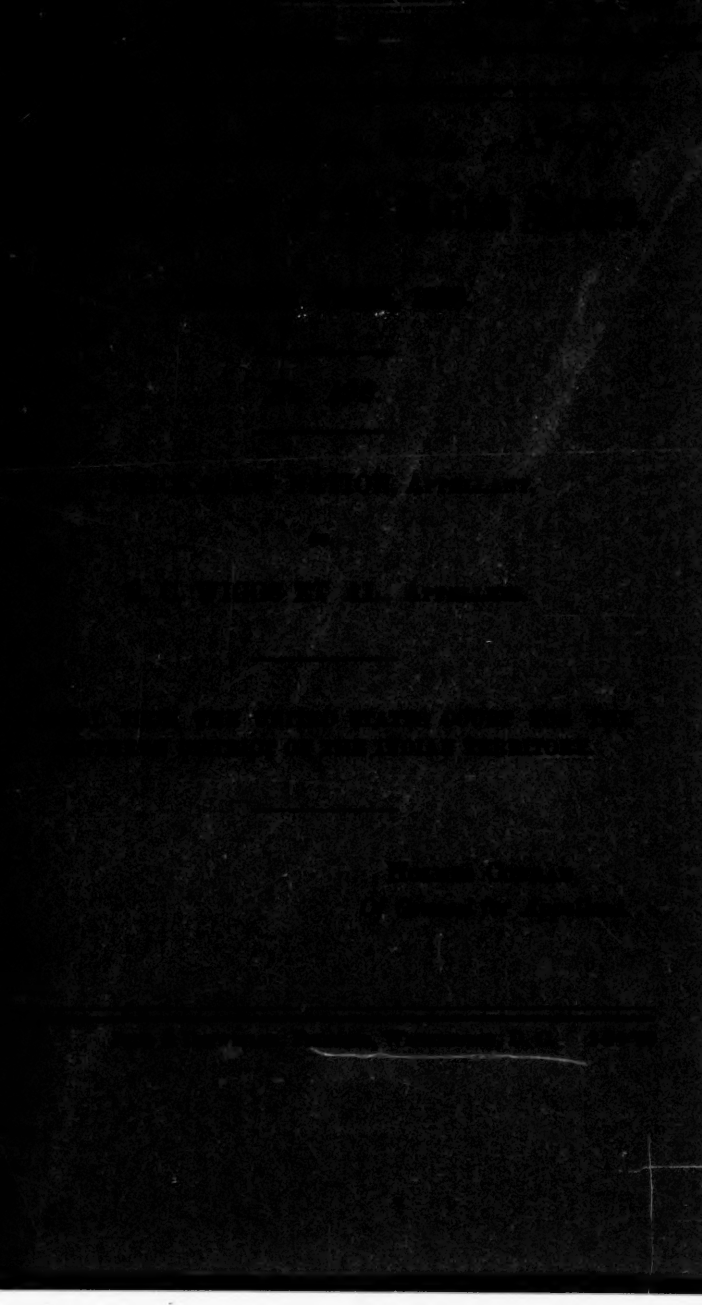
Accordingly the district judge enrolled twenty-one as descendants of Nancy Frazier, and four as husbands or wives of her descendants.

In No. 520, the master reported as follows :

It appears, from the evidence in the case, that the applicants are the descendants of Elizabeth Colbert, a Chickasaw Indian by blood, who married a man by the name of George Stewart; that the said George Stewart and Elizabeth Colbert had a daughter, by the name of Elizabeth Stewart, through whom these applicants claim; that said Elizabeth Stewart married a white man by the name of Bledsoe Holder; that said Bledsoe Holder and Elizabeth Stewart had a number of children, among them being Wm. L. Holder, Jackson A. Holder, and Burton A. Holder; that the said Bledsoe Holder and wife lived in the old Chickasaw reservation, in the state of Mississippi, and left the state of Mississippi, with the other Indians, en route to the Indian Territory, but that they stopped, with their children, in southwest Missouri, and remained there about twenty years; that they afterwards came into the Indian Territory, and finally drifted to the northern border of Texas and remained there a number of years. It appears, from the evidence, that the said Bledsoe Holder and Elizabeth Holder and their descendants, who are concerned in this application, at all times claimed to be citizens of the Chickasaw nation, and that they lived in, and about, the Chickasaw nation, from time to time, ever since they came west of the Mississippi river, and that they in fact have Chickasaw blood in their veins.

The judge thereupon added ninety-nine to the roll of Chickasaw citizens, all of whom had been rejected by the Dawes Commission.

HALBERT E. PAINE,  
*Atty. for Chickasaw Nation.*



IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1898.

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No. 496.

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CHICKASAW NATION, APPELLANT,

vs.

R. C. WIGGS ET AL., APPELLEES.

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APPEAL FROM THE UNITED STATES COURT FOR THE  
SOUTHERN DISTRICT OF THE INDIAN TERRITORY.

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The appellees move to dismiss these cases on the several grounds set forth in the brief of counsel, which will be considered in the order there presented.

First. "Because the act of Congress which conferred jurisdiction upon the United States court for the southern district of the Indian Territory, to try this case, and which was in force at the time the judgment therein was rendered in said court, made the decision of said court final *without appeal*. The judgment appealed from was rendered in the court below on the 22d day of December, 1897, and said court finally adjourned for the term on the 26th day of March, 1898, and the law authorizing this appeal was approved July 1st, 1898."

The act of Congress authorizing the commission to the five civilized tribes in the Indian Territory "to hear and determine the application of all persons who may apply to them for citizenship in any of said nations" defined the powers of the commission as follows, viz :

"In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for, and compel attendance of witnesses, and to send for persons and papers, and all depositions, and affidavits and other evidence, in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of the said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of the persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall hereafter be held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in the several tribes: *Provided*, That if any tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final" (29 St., 339).

The act of Congress authorizing appeals from the United States courts in the Indian Territory to the Supreme Court of the United States provides :

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, to either party, in all citizenship cases, and in all cases between either of the five civilized tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act, must be perfected



in one hundred and twenty days from its passage ; and in cases decided subsequent thereto, within sixty days from final judgment ; but in no case shall the work of the commission to the five civilized tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

The ground of objection assigned here is simply that the legislation of Congress extending the remedy by appeal to the Supreme Court of the United States was *retrospective*, and for that reason invalid.

In *Blount vs. Windley*, 95 U. S., 180, the same objection was urged as to certain legislation by the State of North Carolina, but this court, speaking through Mr. Justice Miller, said :

" It may be said that this legislation is retroactive ; and as applied to the case before us, it is so. But there is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial and sometimes necessary. Where they violate no provision of the Constitution of the United States there exists no power in this court to declare them void."

It is true, to be sure, that statutes will be so construed as to give them only a prospective operation, where the language of the act admits of such restricted construction, but, as was said by this court in the *Twenty Per Cent. Cases*, 20 Wall., 187 :

" Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature

of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

There can be no doubt as to the meaning and intention of Congress, as declared in the terms of the act, allowing appeals from judgments already rendered in these citizenship cases.

If reason is to be sought for this extraordinary course of procedure, authorized by Congress to be taken in this peculiar class of cases, it may, perhaps, be found in the character of persons, and of subjects, with which Congress was then dealing—persons who, while not citizens of the United States and not adapted by nature or education to the intelligent use and enjoyment of the institutions which characterize the civilization of the age and country in which they live, are yet the objects of congressional solicitude and care. The means devised and employed by Congress for the protection and advancement of the interests of the Indians have of necessity been experimental and tentative, and the tribunals erected from time to time for the administration and determination of their affairs, while clothed with some of the forms of courts, have yet been only commissions whose judgments have none of the sanctity or finality of courts established under the Constitution. Some of the five civilized nations have State governments, possessing all the forms and features of the constitutional governments within the United States—governors, legislatures, and judicial courts—yet none of these are recognized as exercising the authority and power of the governments of the States of the Union.

In the act of Congress of June 10, 1896, making appro-

priations for the Indian Department and for fulfilling treaty stipulations with the various Indian tribes, the authority to the commission to the five civilized tribes to hear and determine the application of persons for citizenship in any of said nations was enlarged and continued, and, as indicative of the sense of Congress, that the plans hitherto adopted had proved ineffective it was provided :

“ It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof ” (29 Statutes, 340).

There had been tried in succession the Indian councils, the “ Dawes ” commission, the United States district court as tribunals by which these questions of citizenship might be determined, and all had proven unsatisfactory. By the act of 1898 it was thought proper to extend the remedy still further, and the right of appeal to the Supreme Court of the United States was allowed.

Counsel for appellee is in error in the statement in this assignment of error in his brief that the act of Congress which conferred jurisdiction on the district court “ made the decision and judgment of said court final *without appeal*.” That act does provide “ that the judgment of the court shall be final,” but not that it shall be “ without appeal.” The term “ final ” was used in the sense in which it is employed with reference to the decrees and judgments of other courts, viz., that it ended the litigation. A final decree in a chancery suit in the same way ends the cause, but does not preclude an appeal ; and here, if the right of appeal to the Supreme Court had then existed, this language might with propriety have been used with reference to the judgment of the district court.

Congress, in enlarging the remedies already provided for

the ascertainment and determination of the rights of persons and of the Indian tribes by adding this right of appeal to the Supreme Court and making it, in express terms, applicable to judgments already rendered in citizenship cases, was acting within the scope of its rightful powers. The Federal Constitution nowhere prohibits retrospective legislation by Congress or by the States; and it cannot be reasonably contended that the creation of a new or additional remedy, which by the law is made applicable to existing judgments, is obnoxious to any principle of right or justice unless the rights of third parties are affected injuriously or the *status quo* of the parties has been changed so as that the judgment creditor would be injured by the enforcement of the act.

Suppose, instead of allowing an appeal to the existing judgment debtor, the act had allowed an additional remedy to the judgment creditor, as, for instance, that his judgment might be satisfied by the levy of a *fieri facias* on the land of the debtor instead of the expensive and laborious remedy of a bill in chancery to subject the same to the lien of the judgment, could the debtor complain that his "vested rights" were disturbed?

"There is no doubt of the legislature to pass statutes which reach back to, and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State constitution, and provided further that no other objection exists to them than their retrospective character."

Cooley Con. Lim., page 369.

Second. The act of Congress of the 1st day of July, 1898, is unconstitutional and invalid—

"because the same is an invasion of the rights and provinces of the Judiciary Department of the Government by the Legislative Department, because the same disturbs and destroys vested and valuable rights and deprives the appellees of their property without due process of law."

The legislature cannot control the action of the courts by requiring of them a construction of the law according to its views, but at variance with the views of the court. It cannot set aside the judgments of the courts or compel them to grant new trials or to discharge offenders or direct what particular steps the court shall take in the progress of judicial inquiry (*Cooley Con. Lim.*, page 94). But, whatever objections may lie to legislation which creates new remedies and makes them applicable to existing judgments, it cannot be contended that it is an invasion of the judicial domain. Legislation which disturbs and destroys vested rights cannot, with propriety, be said, for that reason, to be "an invasion of the rights and provinces of the Judiciary Department," for the Judiciary Department has no more authority than the Legislative to disturb vested rights.

But does this legislation disturb vested rights?

Judge Cooley says (*Con. Lim.*, 358):

"And it would seem that a right cannot be regarded as a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.

"But there are many cases in which, by existing laws, defenses based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defense if it possesses the power to do so. In regard to these cases, we think investigation of the authorities will show that a party has no vested right in a defense based upon an informality not affecting his substantial equities."

There is no vested right in the defense of limitations or of usury. (See *Campbell vs. Holt*, 118 U. S., 620.) Statutes have been upheld as valid which cured defects in the acknowledgments of deeds, validated irregular marriages, and gave health and vigor to imperfect contracts.

In *Ex parte McCardle*, 7 Wallace, 506, the petitioner was deprived of his personal liberty. The circuit court had denied his petition for discharge on *habeas corpus*. He had appealed to this court under the statute, which was then in force, giving him the right of appeal. While his case was pending here Congress repealed the law which allowed the appeal, and this court dismissed his case for want of jurisdiction, because he had no vested right in the remedy which was in existence when this court took jurisdiction.

In *Freeland vs. Williams*, 131 U. S., 406, Freeland obtained judgment against Williams in an action of trespass in the State court of West Virginia, and this judgment was on writ of error affirmed by the court of appeals of that State. Subsequently a constitutional provision was adopted, prohibiting the enforcement of judgments obtained in actions of trespass for acts done "according to the usages of civilized warfare." The legislature, proceeding to carry this provision into effect, provided that in such cases a bill in chancery might be filed to set aside the judgment. Such bill was brought by Williams, with the result that the judgment was set aside. On writ of error from this court that decree was affirmed.

In *Garrison vs. City of New York*, 21 Wallace, 197, the legislature of New York had on the 17th May, 1869, passed an act for widening and straightening Broadway. It required commissioners to cause certificates and maps of the location of the new lines to be filed in certain public offices in New York, and declared that such maps and certificates should be final and conclusive. It required that certain other commissioners to be appointed by the supreme court should make assessments of damages for private property affected. In this case all that the act required was done, and the report of the assessing commissioners was duly returned to, filed in, and on the 28th December, 1870, confirmed by the supreme court.

On the 27th February, 1871, nearly two months after the

confirmation of the report, the legislature by act authorized an appeal to be taken from the order of confirmation. This act provided "that if it should appear that there was any error, mistake, or irregularity or illegal act in the proceeding at any stage, or that the assessments for benefit, or the awards of damage, or either of them, had been unfair and unjust, or inequitable or oppressive as respects the city or any person affected thereby, the court or justice should vacate the order of confirmation."

On writ of error from this court, it was held that the legislation was valid, saying :

"It is her (the State) duty to see that the estimates made are just not merely to the individual whose property is taken, but to the public which is to pay for it, and she can, to that end, vacate, or authorize the vacation of any inquest taken by her direction to ascertain particular facts for her guidance. \* \* \* Nor do we perceive how this power of the State can be affected by the fact that she makes the findings of the commissioners upon the inquest, subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort to other methods for the correction of the finding where irregularity, mistake or fraud has intervened."

Surely the reasoning which controlled the court in that case must be allowed to have equal cogency here, where the facts and proceedings were so strikingly similar.

In *Louisiana vs. Mayor of New Orleans*, 109 U. S., 286, judgments for a large amount had been recovered against the city for damages done to private property by rioters. By provision of the State constitution adopted subsequent to the judgments, the power of the city to impose taxes was so restricted as to make it unable to pay the judgments. On mandamus to compel the city authorities to make levies and

pay the judgments, the supreme court of the State denied the writ, and that judgment was, on error, affirmed by this court. Mr. Justice Field, speaking for this court, held that such a judgment was not a contract within the contract clause of the Federal Constitution, and that "the relators have no such vested right in the taxing power of the city as to render its diminution by the State to a degree affecting the present collection of their judgments a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he was unable to collect it."

The act of Congress merely conferred a remedy which had not before existed; it did not attempt or operate to interfere in any way with the function of the judicial department of the Government. If Congress has constitutional power to take away the existing right of appeal, it is difficult to understand why it has not, with more obvious propriety, the power to confer such right. Where a litigant, having under existing laws a right of appeal, neglects this right and allows it to expire by the law of its own limitation, there would seem to be grave reasons why the legislature should not interpose, after the right of appeal had expired, and attempt by special legislation to resuscitate it. The same objection would seem to exist to such legislation as has so often been enforced to attempt by the legislature to grant new trials.

Story, Constitution, sec. 1379.

Butler vs. Palmer, 4 Hill, 324.

Wilkinson vs. Leland, 2 Peters, 660.

Calder vs. Bull, 3 Dallas, 386.

In *Convers vs. Burrows & Prettyman*, 2 Minn., 229, the act of March 1, 1856, allowed an appeal "from an order granting a new trial." It was objected that this was unconstitutional. The court said (page 240):



"The object of the act is evidently to extend the right of appeal beyond what previously existed. It is a remedial law, and should receive a liberal construction. It provides a remedy in a case where otherwise injustice might be done, and should be given effect in all cases where proceedings have not been had to such an extent as to exclude its application. Statutes of this nature may be considered *ultra*, but not *contra*, the strict letter (1 Kent, 465), and the doctrine that statutes retrospective in their effect are unconstitutional is held not to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute invested rights (1 Kent, 455). We cannot perceive how the act giving the right of appeal in this case impairs in any manner the contract between the parties or affects any vested right of the defendants."

In the naval appropriation act of March 3, 1873 (17 St., 556), it was enacted—

"That the Supreme Court may, if in its judgment the purposes require it, allow any amendment, either in form or substance, of any appeal in prize cases, or allow a prize appeal therein, if it appears that any notice of appeal, or of intention to appeal was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein."

This rather startling legislation was enforced by this court in the case of *The Nuestra Senora de Regla*, 17 Wallace, 29.

We submit that there has been no disturbance of any vested right of these appellees or any impairment of their constitutional rights of any sort. Some text books, as Sutherland on the Construction of Statutes, do state in general terms that an appeal cannot be allowed after judgment, but the cases cited as authority for the statement do not sustain it, and *Burch vs. Newberry*, 10 N. Y., 374, relied on by counsel for appellee in his brief, will be found on examination

to decide no more than is allowed to it by Judge Cooley (Co. Lim., 96), where he says that it held "that the legislature had no power to grant to parties a right to appeal *after it was gone under the general law.*"

In *State vs. Northern Central R. R. Co.*, 18 Maryland, 193, the legislature authorized the court of appeals to hear and determine an appeal in the case, the right to which did not otherwise exist. The court said :

"The act above cited does not divest any right or infringe upon the judicial powers of the court. It refers to it all such questions as may fairly be presented by the transcript."

In *Calder vs. Bull*, 3 Dallas, 386, it is said :

"If any one has a right to property, such right is a perfect and exclusive right, but no one can have such right before he has acquired a better right to the property than any other person in the world; a right therefore only to recover property cannot be called a perfect and exclusive right."

The right which is here claimed to be a "vested right" is exemption and immunity from review or supervision of the judgment which he has obtained in the district court.

He certainly has the same vested right in his judgment that he had in the original cause of action, and he has no more or other right. If his judgment was rendered erroneously it tends to defeat justice and pervert equity. The holder of such judgment can "have no vested right to do wrong."

The legislature does not impair his rights or deprive him of his property when it seeks, by the creation of further and more stringent remedies, to have that judgment examined to the end that it may be seen whether it does in truth effectuate the law.

Third. "Because the act of Congress approved July 1st, 1898, authorizing the appeal in this and similar

cases, if valid for any purpose, only authorized appeals to be taken in cases, and upon questions involving the constitutionality and validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory."

The statute itself is its best interpreter. Referring to it, we find that it expressly provides as follows:

"Appeals shall be allowed from the United States courts in the Indian Territory, direct to the Supreme Court of the United States, to either party, IN ALL CITIZENSHIP CASES, AND, in all cases between either of the five civilized tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands &c."

So here were two distinct classes of cases provided for in this act—one being "in all citizenship cases," the other being in cases between either of the five civilized tribes and the United States. This case comes within the first class and does not involve the constitutionality or the validity of the legislation affecting citizenship or the allotment of lands.

On the whole case we submit that the only question presented on this motion to dismiss is whether the act of 1898 does disturb any vested right of the appellee or deprive him of any property, and on that question we submit the case with confidence.

HOLMES CONRAD,  
*Of Counsel for Appellant.*



IN THE SUPREME COURT  
OF THE UNITED STATES.

No. 496.

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CHICKASAW NATION, APPELLANT,

vs.

R. C. WIGGS, ET AL, APPELLEES.

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*Appeal from the U. S. Court for the Southern  
Judicial District of the Indian Territory.*

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MOTION TO DISMISS APPEAL.

Now come the appellees, and move the court to dismiss the appeal in this case for the following reasons, to-wit:

*First.* This court has no jurisdiction to hear and determine the appeal in this case, because the Act of Congress which conferred jurisdiction upon the United States Court for the Southern District of the Indian Territory to try this case, and

which was in force at the time the judgment herein was rendered in said court, made the decision and judgment of said court final without appeal. The judgment appealed from was rendered in the court below on the 22nd day of December, 1897, and said court finally adjourned for the term on the 26th day of March, 1898, and the law authorizing this appeal was approved July 1st, 1898.

*Second.* The Act of Congress passed on the 1st day of July, 1898, which authorized an appeal to be taken in this and similar cases is invalid and unconstitutional, because the same is an invasion of the rights and provinces of the Judiciary Department of the Government by the Legislative, because the same disturbs and destroys vested and valuable rights, and deprives the appellees of their property without due process of law.

*Third.* The appellees further move the court to dismiss this appeal because the Act of Congress approved July 1st, 1898, authorizing the appeal in this and similar cases, if valid for any purpose, only authorized appeals to be taken in cases and upon questions involving the constitutionality and validity of any legislation affecting citizenship or the allotment of lands in the Indian Territory; and the record in this case is not prepared, nor are the questions certified as required by law in appeals of this character.

On the 15th day of August, 1896, Richard C. Wiggs filed an application before the Dawes Commission to be admitted to citizenship in the Chickasaw

Nation. At the same time he filed an application in behalf of his wife, Josie Wiggs, and his daughter, Edna Wiggs.

On the 15th day of November, 1896, the Dawes Commission granted the application of Richard C. Wiggs, and rejected the application made by Richard C. Wiggs for his wife and daughter. Richard C. Wiggs, on behalf of his wife and daughter, appealed from the judgment of the Commission rejecting his wife and daughter, and the Chickasaw Nation appealed from the judgment admitting the said Richard C. Wiggs. These two appeals were united in one case, by agreement, in the United States Court for the Southern District of the Indian Territory, to which court the appeals were taken. The application before the Dawes Commission was made under the Act of Congress approved June 10th, 1896. U. S. Statutes at Large, 1st Session of the 54th Congress. page 399.

On the 22nd day of December, 1897, the case was duly heard upon the Report of the Master in Chancery by the United States Court for the Southern District of the Indian Territory, and all of the applicants were admitted.

Afterwards, and during the next term of the Court, and on the 11th day of July, 1898, the Appellant made application for appeal, and has brought the case to this court by appeal.

Wherefore, Appellees pray that said appeal be dismissed.

C. C. POTTER,

FOR APPELLEES.

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BRIEF OF APPELLEES  
IN SUPPORT OF THEIR MOTION TO DIS-  
MISS APPEAL.

On the 10th day of June, 1896, Congress placed a provision in the Indian Appropriation Bill which authorized the Commission to the Five Civilized Tribes to pass upon questions of citizenship in the Indian Territory, and upon questions of membership in said tribe, upon application duly made to said Commission. Said Act further provided that either party might appeal from the decision of said Commission in any such case to the United States Court for the Indian Territory, whose decision in the matter should be final without appeal.

U. S. Statutes-at-Large, 1st session of the 54th Congress, page 339.

On the first day of July, 1898, Congress passed an Act allowing appeals from all cases of citizenship decided by the United States Courts in the Indian Territory, providing that the appeal might be perfected within four months from the passage of the Act in all cases already decided; and in all cases thereafter decided, within sixty days from the date of the judgment. This act was a part of the Indian appropriation bill, and is found on page 591 of the statutes-at-large of 1898. The main question to be discussed is the validity of the act of Congress granting appeals in citizenship cases, when applied to cases decided before the act was passed.



We respectfully submit that congress had no power to change the character of a judgment rendered by a court of competent jurisdiction from a final judgment from which no appeal is allowed, into a judgment not final beyond the power of appeal, or to in any way alter or modify such judgment so as to make it less valuable to the person in whose favor it is rendered, or to make it any less a settlement of the rights of the parties or the matters in controversy. So far as we have been able to ascertain no legislation exactly of this character was ever before attempted by congress. In some of the states legislation similar, or at least analagous, has been attempted, but in every case the same has been held unconstitutional and an unwarranted invasion of the rights and powers of the judiciary by the legislative department of the government.

The case of *D. Chastelax vs. Fairchild*, 15 Pa. state, page 18, was a case in which the legislature passed a law providing that a new trial should be granted in a certain case already decided, and directing that the case proceed to trial and judgment in the same manner and of like effect as if it had not previously been tried. The Pennsylvania court held this law invalid because it was an attempted exercise of judicial function by the legislature, and used very vigorous language in expressing the opinion of the court upon the subject. The court said, among other things: "The functions of the several parts of the government are severally separated and distinctly assigned to the principal branches of it—the

legislature, the executive and the judiciary—which, within their respective departments, are equal and co-ordinate. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action; then will there be concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be despotism, a government of unlimited, irresponsible and arbitrary rule.” This statement of the division of the powers of government is universal in its application in this country in both national and state constitutions. The language and the warning of the Pennsylvania court will apply as well to an effort on the part of congress to exercise judicial authority as it would to that of the state legislature.

In *Wayman vs. Southard*, 6 Curtis, page 327, Chief Justice Marshall stated the familiar formula in reference to the division of the powers of the general government, which has ever since been accepted and a hundred times re-stated. And the division is, of course, the same as stated by the Pennsylvania court.

Mr. Freeman, in his work on judgments, 1st vol., sec. 90, lays down the rule in regard to the exemptions of judgments of courts from legislative interference in this language: “The legislature can not set aside a judgment, and can not authorize any court to set aside a judgment, which had been rendered by it and passed beyond its control before the passage of the act.”

In his work on statutory construction, page 628, Mr. Sutherland states the rule as follows: "When a right has been perfected by judgment the fruits of recovery can not be diverted by new legislation, nor can the rights secured by judgment be subjected to new hazard ~~by~~ creating a new right to appeal."

Mr. Black, in his work on judgments, 1st vol., sections 298-9, states the same doctrine, as follows: "The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it can not be exercised by the legislature. While a statute may indeed declare what judgments shall *in future* be subject to be vacated, or when or how, or for what causes, it can not apply retrospectively to judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and second, because it would be an unwarranted invasion of the province of the judiciary department."

Smith, in his commentaries on statute and constitutional law, from sec. 347 to sec. 382, ably discusses many phases of this question, and announces substantially the same doctrine.

During the civil war the legislature of Arkansas passed a law continuing all cases for the recovery of debt then pending in the courts of that state until

the cessation of hostilities. The Supreme Court, in the case of *Burt vs. Williams*, 24 Ark., page 90, held this law to be invalid, because an invasion of the rights of the judiciary by the legislature.

The case of *Burch vs. Newbury*, 10 N. Y. Court of Appeals, page 274, was a case in which the court was considering, among other things, the effect of a statute which was substantially as follows: "An appeal may be taken from any final decree entered upon the single direction of the judge in any suit of equity pending in the Supreme Court on the 1st day of July, 1847, within ninety days from the time this act shall take effect, and such appeals can be taken in the manner provided in sections 327 and 348." The court held the law invalid, and, among other reasons, upon the ground that it deprived the party, who had obtained judgment, of his property without due course of law. The opinion we consider quite a strong one and, while the law, in our judgment, could have been held invalid by a course of reasoning equally as strong on the ground that it was a usurpation of the judicial authority by the legislature, still much of the reasoning is so pertinent to the question under consideration that we beg to quote quite a lengthy extract from the opinion: "The direct effect of the act in question, if valid, is the granting of a new trial or hearing upon all the questions both of law and evidence arising in the case, after it had been lost by the neglect of the complainant under the provision of law as they existed at the time the decree was made. and after it had become final upon the rights of the parties involved in the suit, and the

defendant had acquired possession of the fruits of the litigation by due execution upon it. If the act is not invalid upon the principles which I have endeavored to state, as I think it is, it seems to me that it is contrary to the clause in article 1, section 6, of the constitution of this state, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' The act assumes to create the means by which the complainant may open the decree for a reconsideration and adjudication upon the merits in controversy in the suit between the parties, irrespective of the present decree, substantially by another court having power to alter, modify or reverse the decree and to make a new decree adjudging money to be paid by the defendant to the complainant. In such an event, the money adjudged to and obtained by the defendant under the existing decree, would be taken from him and returned to the complainant, and the means provided by which—upon the contingency, that the appellate court shall come to a contrary conclusion upon the merits of the controversy from that which the court, pronouncing the decree, came—it might and would be done. It is in effect doing more than merely annulling a complete and final decree, by which property has been acquired and possessed. Contingently, it not only deprives such person of the property thus acquired, but compels him to pay to his adversary such sum of money as the appellate court may determine he ought to pay. That the money adjudged to be paid by the decree and received by the defendant under it, was his property in a legal sense, at

the time of the passing of the act, can not admit of any doubt; he owned, had a legal title to it, and was in possession of it. It is true the act does not absolutely deprive the defendant of the money decreed to him, but it does so contingently in effect. I think the provision contained in the constitution referred to, secures a person against being deprived of his property, either contingently or absolutely. If the appeal authorized to be taken by the act may result in depriving the defendant of his property, it is in my opinion, contrary to the constitution."

In the case of *Skinner vs. Holt*, 69 N. W., 595, the Supreme Court of South Dakota held that where, after an appeal had been taken from a judgment of the court decreeing that the proceeds of a life insurance policy were assets of the estate for the partial payment of the debts of the estate, the legislature enacted a law providing that the proceeds of insurance policies, whether theretofore or thereafter issued, shall, to the amount of \$5,000, inure to the separate use of the widow, husband or minor children, independently of the creditors, such act of the legislature, if held to affect the rights of creditors to the proceeds of the policy upon which the decree was based, was invalid, because the same would deprive unreversed judgments of the elements of conclusiveness, intrench upon the principle which separates the legislative and judicial powers, and in effect amounts to a reversal of the judgment by the legislature.

In the case of *Davis et al vs. the Village of Menasha et al*, 21 Wis., 497, the Supreme Court of Wisconsin had under consideration a question almost exactly like this one. The legislature had passed an act which authorized courts to re-open judgments after the time allowed by law for appeals, in existence at the time the judgment was rendered, had expired, when such failure to appeal had been caused by the death of the judge. The law was intended to apply to cases that had been tried within three years before its passage, as well as to those thereafter to be tried. The court held the law unconstitutional and invalid upon two grounds; first, that it disturbed vested rights settled by the judgment; second, that it was a clear invasion of the rights of the judiciary by the legislative department of the government. The reasoning in this case is strong and very pertinent to the question under discussion. We invite the court's attention to it.

In the case of *Atkinson vs. Dunlap*, 50 Me., 111, the Supreme Court of Maine was considering almost the exact questions we have here, and the court announced its conclusion as follows: "That the legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but after all existing remedies have been exhausted, and rights have become permanently vested, by judgment, all further interference is prohibited."

In the case of *Taylor vs. Place*, 4 R. I., 324, the Supreme Court of Rhode Island were discussing a case in which the legislature had, by joint resolution,

attempted to direct that a verdict and judgment rendered in a judicial proceeding should be set aside and a new trial granted. The court, in a very elaborate and able opinion, discusses many features of the questions now under consideration, and the dividing line between the judicial and legislative authority is well drawn and strongly stated. Of course the attempted action of the legislature was held void and unconstitutional. We invite the attention of the court to this case.

In the case of *Martin vs. South Salem Land Company*, 26 S. E., 591, the Supreme Court of Virginia laid down the doctrine that when litigation has proceeded to a judgment which settles a controversy on the merits, it is beyond the power of the legislature to alter or control.

*Roberts vs. the State*, 51 N. Y. S., 691, is a case where Roberts had been convicted for burglary by a court of competent jurisdiction, from which no appeal had been taken. Roberts having served two years of his sentence, was then pardoned. Afterwards, an act was passed by the legislature authorizing him to present a claim to the board of claims for damages sustained by him by reason of improper conviction and imprisonment, and authorizing the board to award such damages. In this case the court held that if the effect of the statute was to invalidate the judgment, the statute was void, because the same was an exercise of judicial functions.

In March, 1895, the legislature of Utah passed an act which provided that in all cases involving the rights of polygamous children which had been de-



terminated adversely to said children prior to the passage of said act, a motion for a rehearing should be entered on their application filed within a year after the passage of the act. In *re Handly's Estate*, 49, p. 829, the Supreme Court of Utah held this act invalid because the same assumes a control over the judiciary by the legislature which is not warranted by the constitution.

In *Dash vs. Van Kleeck*, 7 Johns, 477, the court says that the legislature undoubtedly has no power to annul an existing judgment, because there immediately arises a contract against the party adjudged to pay the same in favor of him to whom it is awarded.

There is no doubt but if legislation of this character had been passed by any state legislature it would have been clearly invalid, because, if for no other reason, it is violative of that provision of the constitution of the United States which prevents a state from passing any law impairing the obligation of contracts, and this is the reason generally assigned by the courts for holding such legislation void. This has been repeatedly decided, and the expression of the courts has been uniform without exception, so far as we know. Such legislation, if attempted by a state, would also be invalid because contrary to the ~~fifteenth~~ <sup>fourteenth</sup> amendment of the constitution of the United States, because it deprives a citizen of his property without due process of law, and a state can not do this. But it is claimed that there is nothing in the constitution of the United States that prevents Con-

gress from depriving a citizen of his property without due course of law, nor that prevents it from disturbing vested rights or impairing the obligation of contracts. It may be true that there is no express denial of authority, and yet Congress had ~~no~~ constitutional power to pass such a law. We know it to be a fact that this court has frequently in opinions referred to the doctrine of vested rights as though it applied to congressional legislation. We have some cases before us where this subject was referred to—the case of *Norris vs. Crocker*, 19 Curtis, page 575—in which the plaintiff had sued the defendant to recover of him a penalty provided by act of Congress for the unlawful detention of a slave. Pending the suit Congress repealed the law which authorized such recovery. The court held the repealing law valid, and that it took away the plaintiff's right, the court holding that he had no *vested* right in the penalty, clearly implying that if the plaintiff's right to the penalty had become vested, that a law depriving him of it would be considered invalid.

Also, in the case of *Bernard Sampeyreac, et al, vs. United States*, 10 Curtis, page 458: Congress passed a law authorizing the review of decrees rendered by the Supreme Court of the Territory of Arkansas, where they had been obtained by forgery and fraud. The validity of this act was attacked on the ground that it disturbed vested rights. The court met the argument by stating that the plaintiff in the case was a fictitious person and could have no

vested rights in the judgment, and the court expressly says that if the party who obtained the decree, sought to be reviewed, was a real and not a fictitious person, the question would be different. It never occurred to the court that Congress had any power to disturb vested rights, and the tenor of the entire opinion indicates that the court was of the opinion that Congress possessed no such power.

Chancellor Kent, speaking on this subject, uses this language: "That the retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void. This doctrine, however, is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolutely vested rights, and only go to confirm rights already existing, and in furtherance of the remedy and adding to the means of enforcing existing obligations. I can not assent to the doctrine supposed to be advanced in *Butler vs. Palmer*, 1st Hill, 324, that the legislature has unlimited power to interfere with vested rights, unless they be saved by some restriction to be found in the federal or state constitution." (1 Kent Com., 455, sec. 20.)

It may well be contended that the ruthless disturbance of long vested rights by an act of Congress and the taking and destroying of the property of the citizen without compensation or even notice, by legislation, is so totally un-American, is so shocking to every sense of justice, that it never was the intention

of the framers of the constitution to confer any such power upon Congress, unless it be in extreme emergencies where the general welfare would demand the sacrifice of private rights to public good. It is clear that the framers of the constitution regarded such legislation as wrong, oppressive and immoral, and subversive of that justice which the constitution was intended, by them, to establish, for they deprived the states of the authority to pass such legislation, and it can hardly be contended that it was the intention of the makers of the constitution to confer by implication such power upon Congress.

But, whatever may be the right or power of Congress to disturb and destroy vested rights, it certainly has no power to disturb the final judgments of the courts. We realize to its full extent the doctrine that the remedy always is in the power of the legislature, and that remedies may be changed at the will of the legislature so the right is not destroyed, until the proceeding is perfected into judgment. But then the power to affect it by law ceases, and a very different question arises—should legislation be attempted which affects judgments or rights settled or acquired by them? Remedies can only be made to apply to existing or future litigation. Concluded litigation can not be reached or affected by new remedies. To permit the legislature under the disguise of *remedy* to re-open a final judgment either in the court where rendered or in an appellate court, would be both a perversion of language and of well known rules of law.

*Salters vs. Tobias*, 3 page (N. Y.), 338.

*Dash vs. Van Kleeck*, 7 Johns, 477.

23 Am. & Eng. Encyclopædia, bottom page 450-2.

*Cooley on Constitutional Limitation*, 361 to 364.

1 Black on Judgments, 297-8-9.

*McCabe vs. Emerson*, 18 Pa. St., 111.

*Burch vs. Newbury*, 10 N. Y., 374.

*Pront vs. Barry*, 2 Gill (Md.), 145.

*Ratcliff vs. Anderson*, 31 Gratt (Va.), 105.

*Taylor vs. Place*, 4 R. I., 324.

3 Am. & Eng. Encyclopædia, bottom page 682-3-7, and

*Pennsylvania vs. Bridge Co.*, 18 Howard, 421.

We further concede that this court has repeatedly held that no litigant has such a vested right in the right to appeal that it may not be taken away from him by act of Congress, that is, that where the jurisdiction of the court rests upon a statute and pending the suit on appeal, the jurisdiction of the court is taken away by repeal of the statute, that the court loses its jurisdiction and the proceeding must

abate. Such is understood to be the rule in *Ex-parte McCarty*, 7 Wallace, 506; *Ins. Co. vs. Ritchie*, 5 Wallace, 541; *Railroad Company vs. Grant*, 98 N. S., 398, and other cases. But these cases fall far short of going far enough to establish the doctrine that Congress could interfere with the final judgment of a court, either by authorizing a new trial or an appeal.

These cases proceed upon the theory that the jurisdiction of the court resting upon statute, the repeal of the statute left the court without any jurisdiction as to future or even pending cases. The state courts have generally held that pending litigation could not be affected by such repeal of a statute which conferred jurisdiction; and it strikes us that this is the wiser rule. But this doctrine, however extreme it may be, does not militate against our position, because, no court has ever held that the repeal of a law which conferred jurisdiction upon courts to pass upon a certain class of cases, could in any manner affect a judgment already rendered by said court in such a case; and to make the above cases an authority against our contention in this case, it would be necessary for them to go to this extent. Suppose that in any of the cases above referred to the new law had not only repealed the old law, but had provided that all judgments theretofore rendered thereunder by the courts should be void or should be set aside upon motion, or in any other manner be annulled. Would it be contended that any court in christendom would hold that such legislation was valid as to concluded litigation?

Neither does the case of *Bernard Sampeyreac, et al, vs. the United States, supra*, constitute any authority for congressional interference with final judgments. In that case the superior court of the Territory of Arkansas had rendered a judgment for land in favor of a fictitious person, the judgment being obtained by forgery and perjury. The time for appeal under existing laws had elapsed. There being so much scandal growing out of so many judgments of this character being rendered by the superior court of the Territory of Arkansas that Congress passed an act extending the right to appeal in cases where the judgment had been obtained by perjury and forgery, and was therefore void, for another year, thereby allowing the government in this case to appeal. The question of the unwarranted invasion of the judiciary by Congress was not made in the case, and the point mainly relied upon by the defendant in error was that rights had vested under the judgment, and could not be disturbed. This argument was completely answered by showing that the judgment was void from the beginning, and that the plaintiff was a fictitious person. Indeed; the act of congress extending the time for an appeal or review expressly only applied to void judgments, and not to valid ones. Equity would have relieved against such judgment without the aid of the law.

Nor is the case of *the United States vs. Grant, 110 U. S., 225*, any authority for such legislation. That was a suit in which the government was a party. Upon the petition of the plaintiff the de-

fendant, by an act of its legislature, consented to a partial revision or review of the judgment by the court which rendered it.

This court has not hesitated, on numerous occasions, to resent the attempted exercise of judicial power by Congress. In the case of the United States vs. Klien, 13 Wallace, 128, the court had under consideration an act of Congress which attempted to direct what construction and effect should be given by the courts to pardons issued by the President in cases then pending. The court in strong terms denounced the act as an invasion of the rights of the judiciary by Congress, and held the law unconstitutional.

In the case of the Justices vs. Murray, 9 Howard, 274, this court had a question somewhat similar before it to the one now under consideration. The two questions involved were stated by the court as follows :

*First.* Whether or not the act of Congress of March 3d, 1863, providing for the removal of the cause after judgment by State Court to Circuit Court of the United States for a new trial, is an act in pursuance of the constitution of the United States.

*Second.* Whether or not the provision in the seventh amendment of the constitution of the United States which declares that no fact tried by a jury shall be otherwise re-examined, etc., etc.



The court in an opinion by Justice Nelson held the act of Congress invalid upon the latter ground, expressly declining to decide the question raised by the first ground, indicating thereby that the question raised by the first ground was regarded by the court as a serious one, which the court did not want to take the responsibility of deciding until an actual necessity for such decision should arise.

This court had under consideration this question in the case of the State of Pennsylvania vs. Wheeling & Belmont Bridge Company, 18 Howard, page 421, and used the following language: "But it is urged that the act of congress can not have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it." Again, "Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law."

If we should concede, which we do not, that Congress has the power to disturb vested rights whenever in its wisdom it sees proper, we insist that this authority would not warrant Congress in invading the province of the judiciary and disturbing by either special or general law the final judgments of courts. In this case the plaintiff obtained the judgment of a court of competent jurisdiction establishing his right to certain valuable property and privileges. The judgment was self-executing—that is, the appellees could enter upon the enjoyment of all rights secured to them by it without any process from the court or the aid of any officer. After they had entered into the possession of this property and into the enjoyment of these rights, Congress, by an enactment, forces them into another court, forces them to re-try all the issues of both law and fact which had once been finally tried and determined in their favor. Congress unsettles that which had been settled, dis-establishes that which had been established, destroys the title to appellees' property and involves them again in hazardous and expensive litigation. Congress compels the judge of the court which tried the case below to grant an appeal, to approve an appeal bond, to issue citation, to approve a bill of exceptions. Congress had as well have directed the judge to grant a new trial and re-try the case again in that court, or direct the court what judgment to enter. What would be the difference in granting new trial in the court below and in granting one, by means of an appeal, in the appellate court? What is the difference in directing the court to grant

a new trial and in directing it to grant an appeal that must result in a new trial in the court appealed to, if nothing more? In the language of the court in *Newbury vs. Burk*, Congress has *contingently* deprived the plaintiff of these valuable property rights, because he has been forced to the hazard of another trial in another court that may reverse or modify the decree obtained by the plaintiff in the court below. The character of the judgment rendered by the court below has been changed by an act of Congress. Its final and conclusive effect has been destroyed—the elements of finality and conclusiveness, which are the soul and life of a judgment, have been destroyed. It is now a judgment open to review, subject to be reversed, when, at the date of its rendition and for many months afterwards, it had all the characteristics and effect of a final judgment from which no appeal could be granted, and which fixed and determined finally and for good the rights of the parties. And if Congress can destroy the effect of the judgment to this extent, why can it not destroy the judgment entirely? May we make the further inquiry, why, if the judgment rendered by the United States Courts for the Indian Territory in citizenship cases can be appealed from and reviewed by the authority of an act of Congress passed long after the renditions of said judgments, may not the judgments of every United States Circuit Court, or the Circuit Court of Appeals, be appealed from and reviewed after the time fixed by law for such appeals has expired? And if Congress can authorize such an appeal, why can it not provide that the unsuccessful party may have a

new trial in the same court if he applies therefor within four months from the passage of the act? In fact, if Congress can destroy the final character and conclusive effect of the judgments of these courts, why can it not do so of any court in the land? If Congress can grant the right to appeal three or six months after a judgment has become final, why can not it do so three or six years after judgments have become final? This is not a question of policy; it is one of law, it is one of constitutional authority. If the act of Congress allowing these appeals is valid, then no judgment of a court inferior to the Supreme Court is safe or sacred from congressional interference. The best considered opinions, in this way, may be re-opened to adjudication. Long and well established rights resting upon the supposed inviolability of judicial decision may be re-opened to investigation and further hazard. We refuse to believe that power so dangerous rests with any branch of this government. We are unwilling to accept as sound a doctrine so fraught with evil, a rule of construction so liable to abuse. When Congress has created a court and conferred upon it certain jurisdiction; when it has prescribed the character of its judgments; when the court has proceeded under this law, and within its authority, to a final decision, that is the end of the matter in this country.

This discussion has proceeded upon the theory that the rights secured to the Appellees by the judgment of the court below were valuable rights,

that it involved an adjudication and settlement of their title to property. We take the liberty of here stating what are the property rights held by and appertaining to the members of the Chickasaw tribe of Indians. By virtue of the treaty of 1855, between the United States and the Choctaw and Chickasaw Indians, the United States grants and secures to the members of the Chickasaw tribe of Indians in common, and for their use, occupation and enjoyment, a large district of country. After describing the boundaries of the land set apart to the Choctaw and Chickasaw Indians by the treaty above alluded to, the first article thereof continues: "And pursuant to an act of Congress, approved May 30th, 1830, the United States do hereby forever secure and guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole." The above is the treaty grant and guaranty of the United States government. A patent was also issued to said land, which contained substantially the same provisions. It thus appears from both the patent and the treaty that each member of the Chickasaw tribe of Indians has an equal right to the possession, use and enjoyment of this land with every other member of the tribe. It is a vast tenancy in common, and whenever the appellee and his family were adjudged by the court below to be members of this tribe of Indians and entitled to all the rights and privileges of such membership, it was in effect ad-

judging that they were tenants in common and should be let into the immediate and common enjoyment, with other members of the tribe, of this valuable property. These were the property rights involved in this litigation. These were the rights and titles that were adjudged and settled by the court below. These are the rights and titles vested in the appellee and his family by virtue of the judgment appealed from, and these are the rights and privileges upon the enjoyment of which they had entered when, by an act of Congress, their title was destroyed, and they were compelled to go to another tribunal and there compelled again to vindicate their right to citizenship and possession of the property. What Congress may next do in reference to these sacred rights and interests, no man *knoweth*.

It is a matter of common information that after the rendition of these judgments (for it is also a matter of common information that there are about sixty-five of these cases from the Chickasaw Nation, involving the rights of about six hundred persons), that many of these people, placing the usual faith and credit to which judicial decrees are considered entitled in this country, in the judgments rendered in their favor, materially changed their condition before the act granting the right to appeal had been passed. Their rights had long been disputed by the Chickasaw Nation, a cloud had rested on their title, and the uncertainty born of such condition had paralyzed their energies, dimmed their hopes and destroyed their confidence; but when finally a court had

been opened to them, promising a fair decision upon their claims, and the court had been appealed to, and a final judgment, after a full hearing of the merits, had been rendered in their favor, their doubts were dispelled, the uncertainty was swept away; their hopes were brightened, and they felt a new and greater interest in the country, and began at once to establish for themselves and their families permanent and comfortable homes; but before the new house had been completed, and when the new plans for the future had just begun to be realized, this act of Congress steps in the way, and all is again doubt and confusion, and these people feel almost like they had been ensnared by the laws of their own country. When they asked for bread they were given a stone. This *actual* and not overdrawn or imaginary condition of the situation of many worthy citizens furnishes a striking object lesson of the evils that will, and do, inevitably spring from the vicious rule of permitting the final judgments of courts to be disturbed by subsequent legislation.

If a judgment obtained, in all particulars, according to the laws of Congress in force at the time such judgment is rendered, and the same is expressly made final by the very terms of the law which authorized the proceeding, is not secure from subsequent legislative interference, we would like to know what confidence can be reposed in the judgments of the courts. To establish a rule to this effect would be to hold that the judgments of all courts inferior to the Supreme Court of the United States hang

upon the caprice of Congress. It might at its pleasure confer the right of appeal in all cases where such appeal is now denied; and in cases where it is allowed within a limited time, Congress might repeatedly and indefinitely extend the time, and might give to such enactment a retroactive application, until there would be no end to litigation or confusion. And this monstrous doctrine, fraught with so much evil, without constitutional or judicial authority to sustain it, must, we think, be established by this court in order to sustain the appeal in this case.

We come now to discuss the third grounds of our motion. The record in this case was prepared with a view and in accordance with the rules observed in bringing up the entire case of both questions of law and fact for review on appeal by this court. Our contention is that if the law of 1898 is valid for any purpose and could apply to judgments rendered prior to its passage in any way, it only authorized an appeal to the Supreme Court in cases *involving the constitutionality of any legislation affecting citizenship or the allotment of lands in the Indian Territory*, in the language of the act itself. The appellant raises in this record the question of jurisdiction of the United States Court for the Indian Territory to try this case; and the alleged want of jurisdiction is based upon the invalidity or unconstitutionality of the law authorizing such court to take jurisdiction of and decide such cases. If this court can only review this constitutional or jurisdictional question, then this appeal should be dismissed because the record is not prepared as required



by law for such appeals. The act of March 3rd, 1891, establishing the Circuit Court of Appeals and regulating and defining in certain cases the jurisdiction of the courts of the United States, provides, in section five (5) that appeals or writs of error may be taken from the existing District and Circuit Courts direct to the Supreme Court in the following cases, among others :

“In any case in which the jurisdiction is in issue. In such cases the question of jurisdiction alone should be certified to the Supreme Court from the court below for decision.”

Also “In any case in which the constitutionality of any law of the United States is drawn into question.”

While this case does ~~not~~ involve the constitutionality of a law, and, if that was all it involved, it might be that the very question would not have to be certified to the Supreme Court, as required by the act of March 3d, 1891, but, as above stated, it involves a question of jurisdiction of the court trying the case, and it is the question of jurisdiction that brings up the question of the validity of the law. The two questions are inseparable, and one can not be passed upon without at the same time deciding the other. Hence, we are of opinion that if the act of 1898 only authorized appeals to this court involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands in the Indian Territory, and that question being raised in this record as one affecting the jurisdiction of the court,

that the appeal should be taken and perfected in accordance with the first clause of section five (5) of the act of the 3d of March, 1891, above referred to; and the very question of jurisdiction involved should alone have been certified to the Supreme Court. And that not being done, the appeal should be dismissed on motion. It occurs to us that the correctness of our contention can not be disputed if we are correct in our construction of the act of 1898, authorizing appeals to be taken in this class of cases. We confess that the language in which this law is expressed is somewhat involved and the meaning to some extent obscured, and, standing alone, the meaning might be doubtful; but when we consider other laws and regulations bearing upon the subject of appeal from the District and Circuit Courts to the Supreme Court and from the District and Circuit Courts to the Circuit Court of Appeals, we think the meaning of Congress is clear. Under existing laws at the time the act in question was passed, appeals from the District and Circuit Courts could only be taken to the Supreme Court in certain enumerated cases, among others those involving the jurisdiction of the court and those involving the constitutionality of any legislation. All other cases that were appealable, at all, were to be appealed from the District and Circuit Courts to the Circuit Court of Appeals. No reason is assigned in the law for a change of this universal rule and regulation as to this particular class of cases, nor do we think that any reason can be found in the nature of the litigation itself, or in any fact connected with its history that would fur-

nish an excuse for making an exception in this class of cases. We think it much more reasonable to suppose that Congress intended for these appeals to be taken in accordance with existing laws, and only constitutional and jurisdictional questions should be brought to this court for review, than that Congress intended to burden this court with the review of all the questions of both law and fact involved in so large a number of cases, thereby ignoring the circuit Court of Appeals of the Eighth district and defeating, to this extent, the very purpose of its creation. Besides, the law itself provides that the appeal shall be taken "*under the rules and regulations governing appeals to said court in other cases.*" Can not this provision of the act well be held to mean that only such questions can be appealed to and reviewed by the Supreme Court in these cases as are authorized to be appealed to and reviewed by it in other cases. In other words, does not this provision apply to the questions and issues which can be appealed, as well as to the method of procedure? We are quite confident that when this provision, in the act of 1898, is read in the light of existing laws that its true meaning is to authorize appeals from the United States courts for the Indian Territory direct to the Supreme Court, only in cases involving the validity of legislation affecting the question of citizenship and the allotments of land. It will of course be borne in mind that the act of March 3d, 1891, in section 13, provides that writs of error and appeals may be taken and prosecuted from the decisions of the United States courts in the In-

dian Territory to the Supreme Court of the United States or to the Circuit Court of Appeals in the Eighth circuit in the same manner and under the same regulations as from the Circuit or District Courts of the United States under the said act. We beg to further suggest that the act of 1898 very clearly indicates a purpose on the part of Congress to make as little change in the ordinary method of procedure in reference to appeals as could be done consistent with the purposes of the act. The only change necessary to be made to carry out the purposes of the act was to authorize appeals and limit the time in which they should be taken; and, other than this, we think it was clearly the intention of Congress that other laws and rules bearing upon appeals from District and Circuit Courts to the Supreme Court should apply. Besides, it is hardly possible that Congress would think a disputed question of fact as to the right of citizenship growing out of the question of marriage, blood, residence and relationship was of sufficient importance and of such vital interest to the welfare of society or either of the litigants as would justify it in burdening this tribunal with the investigation and decision of such a question. Upon the other hand, the constitutional right of Congress to interfere in the affairs of the Indians, and create tribunals to decide questions of citizenship and to provide for the allotment of lands in severalty which had long been held in common by these Tribes, was a question of national importance; and it is a well known fact of current history that such power on the part of Con-

gress was being denied by these Tribes, and it was nothing but proper that Congress should provide a method for getting the question before the highest tribunal in the land. And we are constrained to think that this was the sole purpose of the Act in question.

All of which is respectfully submitted, and we request that this motion be sustained, and that the appeal be dismissed.

C. C. POTTER,

*C. C. Potter*  
COUNSEL FOR APPELLEES.



N<sup>o</sup>. 496.

Sup<sup>e</sup>. Ct. of Potter for Appellee

UNITED STATES COURT OF A.  
FILED

FEB 20 1899

JAMES C. MURPHY  
Clerk.

IN THE

Filed Feb. 20, 1899.

Supreme Court of the United States.

No. 496.

CHICKASAW NATION, APPELLANT.

vs.

R. C. WIGGS, ET AL., APPELLEES.

BRIEF OF APPELLEES.

C. C. POTTER ATTORNEY FOR APPELLEES.

The Mathews Printing Co.

# In the Supreme Court of the United States.

CHICKASAW NATION, Appellant.

vs.

R. C. WIGGS, ET ALS., Appellees.

No. 496.

## BRIEF OF APPELLEES.

In order to get an early decision of a question which we consider conclusive of this case, the appellees had the record printed and filed a motion to dismiss the appeal; they also filed a brief in support of that motion. But before the motion could be submitted it was arranged to submit the whole case, and as the motion to dismiss raised a question that is fundamental and jurisdictional, we ask that our brief in support of that motion be considered together with this brief. We find that in the preparation of the brief in support of the motion that we entirely overlooked the language of the fifth article of amendment to the Constitution of the United States. We were misled on this point by the statement of Mr. Cooley, that the guaranty against interference with private property was introduced into the national Constitution by the 14th Amendment. The argument in our former brief proceeded entirely upon the hypothesis that there was no express inhibition in the Constitution against Congress depriving a citizen of his property without due process of law, when in fact the 5th Amendment contains, among other things, the following language: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

This language has been held to apply to, and to be restrictive of, the powers of the General Government.

*Barron v. Mayor of Baltimore*, 7th Peters, 243;

*Livingston's Lessee v. Moore*, 7th Peters, 557;

*Fox v. Ohio*, 5th Howard, 434.



On the power of the legislature to interfere with judgments already final, we cite the following additional authorities:

*Arnold v. Kelly*, 5th W. Va., 446;  
*Lawson v. Jeffries*, 47th Miss., 686;  
*Standaford v. Berry*, 1 Aik (Vt.), 315;  
*Bates v. Kimball*, 2 Chip. (Vt.), 77;  
*Young v. Bank*, 4th Ind., 301;  
*Hill v. Sunderland*, 3 Vt., 507;  
*Eli v. Holton*, 15th N. Y., 595;  
*Griffin's Executors v. Cunningham*, 20 Gratt, 31;  
*Bay v. Gage*, 36th Bard., 447;  
*Boston & Maine R. R. Co., v. Cilley*, 44 N. H., 578;  
*Calkins v. The State*, 21 Wis., 501;  
*Mayor v. Horne*, 26th Md., 194.

We also call attention to *Wade on Retroactive Laws*, Sec. 171, where will be found a very clear discussion of this subject.

This case involves the question of the rights of the intermarried citizens in the Chickasaw nation. The appellee, Richard Wiggs, being a white man and a citizen of the United States, on the 13th day of October, 1875, married a Chickasaw woman, according to the laws of the Chickasaw nation. Afterwards his Indian wife died, and he married a white woman, his present wife, by whom he has one child. The second marriage was also in accordance with the laws of the Chickasaw nation. Wiggs has continued to reside since his first marriage in the Chickasaw nation, and his citizenship was for many years undisputed. He served as sheriff in one of the counties, and enjoyed all the rights of a Chickasaw. The citizenship of himself and family is now denied, and they were applicants before the court below for enrollment in the Chickasaw Tribe of Indians, and their application was granted in full by the trial court.

The rights of intermarried citizens in the Chickasaw nation depend primarily upon the treaty of 1866, between the Choctaw and Chickasaw Indians and the United States, and upon the local laws of the Chickasaw nation.

Much has been said by way of criticism upon the decisions of the three judges of the United States Court in the Indian Territory. It is alleged that these decisions are not uniform, but are in sad and irreconcilable conflict, and gross injustice must have necessarily been done to some one by these warring opinions upon the same subject, when the truth is, that no uniformity could reasonably be expected between the opinions of Judge

Springer, of the Northern District, and the opinions of the other two judges, because they were construing entirely different treaties and different local laws. It was, however, to be expected that the opinions of Judge Clayton, of the Central District, and Judge Townsend, of the Southern District, should be in harmony so far as they were based upon the treaty of 1866, because that treaty applied alike to the Choctaw and the Chickasaw tribes; but the local laws of these two tribes were different, and would have justified a difference in decisions between the two courts. But it appears that the decisions of Judges Clayton and Townsend, so far as the intermarried citizen is concerned, are in substantial harmony.

The provision of the treaty of 1866, relating to the subject of the intermarried citizens, is Section 38, and reads as follows: "Every white person who, having married a Choctaw or Chickasaw and resides in said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw or Chickasaw nation, according to the domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he were a native Choctaw or Chickasaw."

We contend that the effect of this provision is to make the intermarried citizen in all respects equal to the native. Judge Clayton, in construing this provision in the case of *Robinson v. The Choctaw Nation*, uses the following language: "The treaty makes every white man who may marry a Choctaw or Chickasaw woman, a citizen in all respects as though he were a native Choctaw or Chickasaw. By this provision of the treaty there is to be no difference between a citizen, by virtue of his marriage, and a native Choctaw. They are to enjoy equally and alike all the benefits of Choctaw citizenship, as well as share the burdens. Any act, therefore, of the Choctaw council enacted after the ratification of the treaty which makes a distinction between them, granting to one greater privileges or rights or imposing on him more burdens than the other, or which shall undertake to enlarge or curtail the rights and privileges which flow from citizenship as to the one and not as to the other, would be in violation of this provision of the treaty and therefore void. An act which puts the white man in any respect in a different attitude or condition from the Indian is void. The Choctaw statutes undertake to deprive the white man, who should lose his Indian wife and after-

wards marry a white woman, of all the rights of citizenship. The marriage had vested a title to the lands in him. This is to be divested from him, and he is thereafter to be considered as an intruder, subject to be removed from the country under the intercourse laws of the United States. Now, unless a marriage of a native Indian to a white woman, after his Indian wife shall have died, has the same effect on him, that is, decitizenizes him, divests him of all title to the Choctaw land, and deprives him of the right to live in the country, the statute works an equality and the white man does not enjoy the same rights as the Indian. The one may do an act that the other can not do. The one has a privilege, that of marrying a white woman, that the other does not enjoy. The important right of the unrestricted selection of a wife is denied to white citizens by marriage, and, therefore, the provisions of the statute, being in conflict with the treaty, is absolutely void."

But the right to a perfect equality on the part of the intermarried citizen is much stronger under the Chickasaw law than under the Choctaw law. The white man who intermarries with a Choctaw woman must look alone to the treaty for his rights to be on a perfect equality with a native Choctaw, but in the Chickasaw nation there are Constitutional provisions, supplementing the treaty, that secure this perfect equality to the intermarried citizen. It is worthy of remark in this connection that the treaty of 1866 provided a general plan for the allotment of the land occupied by the Choctaw and Chickasaw Indians. And to show that it was intended by the treaty to place the white man who had become a citizen by intermarriage on an equal footing in all respects with the native, it is provided in Section 26 of the treaty that the intermarried citizen shall take all the benefits of the allotment which are secured to the native.

We now invite attention to the condition of the Chickasaw laws both prior and subsequent to the treaty. The first effort of the Chickasaw Indians, after they went West to form a government, was in 1856, when they formed their first constitution, which contained the following provision: "Any person other than a Chickasaw, having legally intermarried with a Chickasaw woman, shall participate in the Chickasaw annuity, but shall not be eligible to any office of trust or profit in this nation; in like manner, a wife, other than a Chickasaw woman, having legally married a Chickasaw husband, shall participate in the annuities of the Chickasaw tribe, provided they are residents of

this nation. This rule shall cease in cases where a husband or a wife other than Chickasaws die or be separated from the bonds of matrimony, but such death or separation shall not affect the rights of the children (born during the intermarriage), to participate in all the rights, privileges and immunities of the Chickasaws."

It will be noted that this provision secures to the intermarried citizen very limited rights, and out of the conditions created by it there grew much trouble and confusion. The intermarried man did not enjoy all the rights of the native, nor did he bear all the burdens of the native, hence the necessity for a provision similar to that contained in Section 38 of the treaty of 1866, which made the white man share equally the privileges and bear equally the burdens of citizenship. This treaty marks a new era in the history of the Chickasaw Indians. It is the first time that it was ever sought by treaty stipulation to define the relations of the white man to the tribe. It was evidently the purpose of all the parties to the treaty, by adopting these liberal provisions, to induce more frequent marriages between the two races. More than a century of experience in dealing with the Indian had demonstrated that the only way to induce the Indian to adopt the methods of civilization in his life and habits was to bring him in close and intimate relations with the white man, where he should attend the same church, patronize the same school, mingle in the same society, meet around the same hearthstone, and the intermarriage of the two races was the only method by which this could be accomplished. Following out this idea, the Chickasaw Indian, in 1867, adopted a new constitution, by which they interpreted for themselves the meaning of Section 38 of the treaty of 1866, and in the 7th section of the general provisions of their new constitution they use the following language: "All persons other than Chickasaws, who have become citizens of this nation by marriage or adoption, and have been confirmed in all their rights as such by former conventions, and all such persons as aforesaid, who have become citizens by adoption by the legislature or by intermarriage with the Chickasaws since the adoption of the constitution of August 18, 1856, shall be entitled to all the rights, privileges, and immunities of native citizens, or who may hereafter become citizens, either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of the governor."

If there could be any doubt as to whether the 38th section of

the treaty of 1866 placed the white man who intermarried with an Indian woman on a perfect, full, and complete equality with the native Indian, there certainly could be no doubt as to what was intended by this provision of their constitution. It would be hard to find language which could express a broader and more complete grant of citizenship. The sole exception contained in the provision only emphasizes the fullness of the grant in other respects. Yet, in the face of this provision, it is contended by the appellant that when the Indian wife dies the intermarried man can not, by a lawful marriage with a white woman, make her a citizen of his tribe and country as a native can. It is also contended that his children by his second marriage, though born in lawful wedlock, though reared by the father in a country of which he is a citizen, are themselves aliens and intruders. This is not only, we think, contrary to the laws of the Chickasaw nation, above quoted, but is contrary to every rule of citizenship recognized among civilized people.

In 1888 the Chickasaw legislature attempted to amend and alter Section 7 of the general provisions of their constitution of 1867. That constitution, itself, provides how it may be amended. Section 11 of the general provisions is as follows: "Whenever two-thirds of both branches of the legislature deem it necessary they may propose amendments to this constitution, and if two-thirds of both branches of the succeeding legislature approve of such amendments they shall be engrafted to and form a part of this constitution."

Section 2 of Article 4 of the constitution provides that the session of the legislature shall be annual at Tishomingo, commencing on the first Monday in September in each and every year. Now it is obvious that the framers of this constitution intended that the people should have the right to pass upon any proposed amendments, as one legislature was to propose the amendment and the next one was to concur.

The bill which had for its purpose the amendment of Section 7 was introduced in the legislature on the 14th of October, 1888, and passed by the requisite two-thirds, but a special session of the same legislature being called in April of the next year, it again passed the proposed amendment, and the legislature next elected by the people took no note of the matter whatever. Hence, we think it is clear that Section 7, as amended, is not in truth a part of the Chickasaw constitution. We beg to call attention to the fact that in many of the published copies of the constitution of

1867 this amendment appears as part of the constitution, with nothing to show that it was an amendment, but it simply appears as a part of the original constitution. The subject of this amendment only becomes important in the event that the court shall fail to agree with us in our construction of the 38th article of the treaty of 1866. Should the court hold that the language of that article is not sufficiently broad to place the intermarried citizen on a perfect equality with the native, then it is important in many cases for the court to determine the validity of this proposed amendment. The amendment simply declares that the intermarried and adopted citizen shall have and enjoy only such rights as are secured to him by the treaty.

Since the adoption of the constitution of 1867, the Chickasaw legislature has attempted to pass some laws that impair the rights of the intermarried man as secured to him by their own constitution. It may become necessary for this court to determine the validity of this legislation. The law which authorized the Dawes Commission to try these cases directed that they should enforce the laws of the various tribes when not in conflict with some law of the United States or some treaty provision, and we presume this court would attempt to do the same thing. Now, if this court should find that the Chickasaw constitution, or some provision thereof, should be in conflict with some law passed by the Chickasaw legislature, and that it would be impossible to enforce both, we presume that the court would have to determine which was superior. The Chickasaw constitution of 1867 is a complete and wise system of government. It creates the legislature and defines its powers, and in Section 19 of the general provisions it declares as follows: "All rights and powers not herein granted or expressed are reserved unto the people, and any law that may be passed contrary to the provisions of this constitution shall be null and void."

Section 14 of the Bill of Rights declares: "The legislature shall pass no retrospective law, or any law impairing the obligation of contracts."

In our brief in support of a motion to dismiss this case we have shown what property rights a member of the Chickasaw tribe of Indians is entitled to. He can only enjoy these rights by continuing to be a member of the tribe. If he is deprived of his membership in the tribe by an act of the Chickasaw legislature, he would thereby be divested of his property rights secured to him by treaty, as well as the Chickasaw constitution. But the



Chickasaw constitution not only secures to the intermarried man these property rights, but it also secures to him certain tribal rights, some of which are political, others social or domestic. If the constitution grants to him any right, whether proprietary, political, social or domestic, he can not be deprived of it by a legislature that can pass no act which infracts the constitution.

The contention has been made before, and we presume that it will be made again, that however extensive the rights of the intermarried citizen may be, and however strongly such rights may be imbedded in treaty and constitutional provisions, yet these rights can not be conferred upon or taken by his second wife or his offspring by a second marriage. We think the argument made by Judge Clayton, in the opinion already quoted, is a complete answer to this contention. If we look to the doctrines of the common law in reference to citizenship, and they are universally observed by our Government in its dealings with foreign nations, we find that the citizenship of the husband determines the citizenship of the wife, and that the citizenship of the father determines the citizenship of the child. The only change in this rule, as applied to Indian citizenship, made by any treaty, or by any constitutional provision, is that which enables a man to become a citizen of the Chickasaw nation by intermarriage with a woman who is a citizen of the Chickasaw nation. Other than this there is no written law contrary to the rules of the common law. There is no good reason why, in the absence of any written law, that the doctrines of the common law should not be invoked in these cases. Yet we are not compelled to resort to the rules of the common law in order to establish the citizenship of the wife and children. If R. C. Wiggs, by his marriage in 1875 with a Chickasaw woman, became a member of the Chickasaw tribe, equal to any other member of the Chickasaw tribe, we do not see why he can not, by the marriage of a white woman, make her a member of the Chickasaw tribe like any other male member of the tribe could do. If R. C. Wiggs, by his first marriage, sustained legally the same relation to the tribe that any other member sustained, we do not see why a white woman could not become a member of the tribe by an intermarriage with Wiggs the same as by an intermarriage with any other member of the tribe. If R. C. Wiggs became a member of the tribe by his first marriage, how is it possible that his children, born in lawful wedlock, are not also citizens of the same nation and members of the same tribe. If these results do not follow from Wiggs' first

marriage, then the treaty which said he should become a member of the tribe, equal to all other members, and the constitution which declared that such intermarriage should entitle him to all the rights, privileges and immunities enjoyed by any native, except to hold the office of governor, are not only defeated and held for naught, but they have become for him a snare and a delusion.

We respectfully submit that logically no answer has ever been made, or can be made to our contention. Our views are sustained by Judge Clayton, who only had the treaty to sustain him in his position. Our position was upheld by Judge Townsend, who had both the treaty and the Chickasaw constitution to support him. But it is sought to avoid the logical and inevitable result of these laws by saying that it is contrary to good policy; that it is destructive to the best interest of the Indians; that it would enable too many white people to become citizens, because if Wiggs should die, his present wife, having become a citizen by her marriage to him, could likewise confer citizenship to another white man, and so on ad infinitum. Our answer to this is, first, the result would not be nearly so bad as is imagined; the natural limitation of human life would prevent such a vast increase of the Indian population as seems to be feared. This treaty stipulation has been in force over thirty years, and in all that time there has but one case arisen where a white person claiming citizenship by marriage with a white person has married another white person and has sought to introduce the third white person as a citizen. If only one case of this sort has occurred in thirty years, certainly the danger is not great. In the second place, it must be borne in mind that the treaty of 1866 regarded the then existing condition of the Indian as not his permanent state, but it was expected that by his social advancement, to a large extent brought about by the treaty itself, he would soon be in a condition to become a citizen of the United States, and would receive his land in severalty and thereby render the rapid increase of the Indian population a matter of indifference to them. This policy and expectation has at last been realized, and we are now on the eve of the allotment of these lands in severalty, and the final breaking up of these tribal relations. This consummation, it is true, has been delayed longer than expected, and longer than it should have been. Like most of social and political changes, it has been slow, but the new policy entered upon by the treaty of 1866, has at last wrought out its intended and inevitable result.

We also might well contend that both the treaty and the con-



stitutional provision are expressed in plain and intelligible words; that the danger which is now regarded as alarming was obvious, at the time the two instruments were drawn, to the most benighted mind. A man did not have to be either a scholar or a statesman, or a skilled diplomat, to know that the consequences that are now present were inevitable in the very nature of things from the new policy entered upon.

How unreasonable it appears to contend that it was only the purpose of the framers of the treaty and of the Chickasaw constitution to confer the meagre and limited rights upon the intermarried man which it is now sought to compel him to accept! Is it reasonable to suppose that it was intended by either instrument to confer upon him less than the rights and privileges of the native, when the language of both express the very opposite? Note the guarded language used in the constitution of 1856. There the Indian looked ahead, and provided for the consequences that should follow the death of the Indian spouse. But in both the treaty and in the constitution of 1866 the death of the Indian spouse was to have no effect on the status of the white man, neither was it intended that anything he might do subsequently, or any relation he might form, should affect him any more than like conduct should affect a native. By his intermarriage he became thoroughly incorporated into the tribe. The tribe could so treat him, as well as those outside the tribe.

C. C. POTTER.

Attorney for Appellee.

All of which is respectfully submitted.

*Henry M. Furman, Herbert*  
**GENERAL BRIEF.**  
*Cruce, Cruce & Thompson for*

**IN THE SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM.**

**No. 496 and others.**

*Filed Mar. 22, 1899.*

**THE CHICKABAW NATION, APPELLANT,**

**VS.**

**R. C. WIGGS ET AL., APPELLEES.**

**Appeals from the United States Court in the Indian Territory.**

**BRIEF OF APPELLERS.**

**HENRY M. FURMAN,  
CALVIN L. HERBERT,  
WM. I. CRUCE,  
ANDREW C. CRUCE,  
JAMES C. THOMPSON,**

*Counsel for Appellors.*

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THE CHICKASAW NATION, APPELLANT,

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## BRIEF OF APPELLEES.

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### Statement.

The appellant, Chickasaw Nation, has had the records printed in Nos. 469, 471, 472 and 486, and in the records in Nos. 476, 484, 485, 487, 490, 493, 494, 495, 498, 501, 502, 503, 505, 508, 509, 511, 512, 516, 517, 521, 522, 525, 531, 532 and 533, the evidence, master's report and judgment of the court show the following facts, and this brief is intended to apply only to above-named cases:

CHICKASAW NATION }  
vs. } No. 485.  
T. D. ARNOLD *et al.* }

The master found that all the applicants except those claiming by intermarriage are lineal descendants of George Colbert, a full-blood Chickasaw Indian, and recommends

that the resident applicants (naming them) be enrolled as members of the tribe of Chickasaw Indians, and recommended that the *non-resident* applicants (naming them) be not enrolled. That Emma P. Arnold and G. H. Bratcher having married long prior to the passage of the Chickasaw marriage law, be enrolled as members of said tribe by intermarriage, and that Wm. Lucas, S. A. Clowders and W. S. Hickerson, who claim membership in said tribe by intermarriage, be not enrolled because *they were not married in accordance with the laws of the Chickasaw nation.* (Rec., 14).

The non-resident applicants excepted to the master's report, and such exceptions were sustained, and upon the master's report, *and the evidence*, on March 16, 1898, the court below entered up judgment final, decreeing that all applicants, *residents* and *non-residents* alike, Chickasaws by blood, were entitled to enrollment as members of said tribe by blood, and that Mrs. Nancy T. Fowler, Mrs. Parale Arnold and G. H. Bratcher are members of said tribe by intermarriage and are entitled to be enrolled as such. (Rec., 26.) Record shows that thirty-eight of applicants are residents and twenty-three are non-residents of the Indian Territory. (14a).

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CHICKASAW NATION	}	No. 506.
vs.		
W. S. KEYS <i>et al.</i>		

The master reported that W. S. Keys, a white man, in accordance with the laws of the Chickasaw nation, on January 2, 1885, was duly and legally married to Mrs. Mollie Underwood, a citizen of the Chickasaw nation by blood, with whom he lived until his wife abandoned him; that as a result of said union there was born a child, a girl, Ella Keys; that on June 11, 1886, Keys applied to the Chickasaw courts

and obtained a divorce from his wife on the ground of abandonment, and that since then he has never remarried. Master recommended that W. S. Keys be enrolled as member of the tribe of Chickasaws by intermarriage, and that the child, Ella Keys, be enrolled as member of said tribe by blood. (Rec., 17). The Chickasaw nation excepted to the master's report and exceptions were overruled, and on December 21, 1897, the court heard said cause upon the master's report, *and the evidence*, and specially found that W. S. Keys, on January 2, 1885, in accordance with Chickasaw laws, and in Chickasaw nation, was legally married to Mrs. Mollie Underwood, a Chickasaw by blood, and that he has continuously resided in the Chickasaw nation since his said marriage, and decreed that Keys be enrolled a member of said tribe by intermarriage, and Ella Keys be enrolled as member by blood. The Dawes Commission admitted these applicants. Nation appealed to U. S. Court in the Indian Territory, Southern District, and from that court nation appeals to this Court. (Rec., 29).

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CHICKASAW NATION <i>vs.</i> SALLIE DUNCAN <i>et al.</i>	}	No. 510.
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The master found and reported to the court that the applicant, Sallie Duncan (whose maiden name was Sallie Little), on May 27, 1872, in accordance with the Chickasaw laws, was married to Bradford Johnson, a *full blood Chickasaw Indian*; that after her husband's death, on May 28, 1878, in accordance with the laws of the Chickasaw nation, applicant was again married to Wm. Duncan, and recommended that applicant be admitted as member of Chickasaw tribe of Indians. (Rec., 15.)

On December 22, 1897, the trial court heard this cause upon the "application, evidence, exhibits, master's report," and exceptions thereto, affirmed the master's report, and decreed that the applicant, Sallie Duncan, be admitted as member of the tribe of Chickasaw Indians. (Rec., 27.)

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CHICKASAW NATION }  
                   *vs.* } No. 511.  
 DORA PHILLIPS *et al.* }

The master finds that James T. Gaines was a Chickasaw Indian by blood ; that Dora Phillips, one of applicants, in accordance with the laws of the Chickasaw nation, was married to said James T. Gaines ; that said Gaines died, and on August 26, 1886, the said applicant was married to George W. Phillips according to the Chickasaw laws, and as result of last-named union there was born unto Geo. W. and Dora Phillips five children, viz. : Ira, Oliver, Birdie, Grover, and Jake, and recommended that said Dora Phillips and husband, Geo. W. Phillips, and their said five children, be enrolled as members of the tribe of Chickasaw Indians. (Rec., 15.)

March 17, 1898, the exceptions to the Master's report were overruled and report confirmed, and upon said report, *and the evidence*, the court decreed that all the applicants are members of the tribe of Chickasaw Indians, and are entitled to be enrolled as such. (Rec., 26.)

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CHICKASAW NATION }  
                   *vs.* } No. 516.  
 THOMAS M. GRAHAM. }

The master found and reported to the court that the applicant, Thomas M. Graham, on June 28, 1886, in accordance with the laws of the Chickasaw nation, was legally

married to Sophie Lee, a citizen of the Chickasaw nation by blood, and continuously since his marriage the applicant has resided in the Chickasaw nation, and recommended that said applicant be enrolled as a member of the tribe of Chickasaw Indians by intermarriage. (Rec., 16.)

June 28, 1898, the trial court, in addition to finding of master, specially found that applicant, on May 13, 1891, was divorced from his wife in the courts of the Chickasaw nation, in accordance with the laws of said nation, confirmed the master's report and decreed that applicant, Thomas M. Graham, be enrolled as a member of the tribe of Chickasaw Indians. (Rec., 28.)

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CHICKASAW NATION	} No. 530.
vs.	
WILLIAM DUNCAN.	

The master found and reported to the court that Sallie Little married Bradford Johnson, a Chickasaw Indian, on May 27, 1872, in accordance with the laws of the Chickasaw nation; that after Johnson's death, and on May 26, 1878, Mrs. Sallie Johnson (nee Little), married the applicant, Wm. Duncan, in accordance with tribal laws, and recommended that application of Wm. Duncan to be enrolled as a Chickasaw be denied. (Rec., 14b.)

Application was also denied by Dawes Commission. (Rec., 11.)

December 22, 1897, this cause was heard by the trial court upon "the application, evidence, exhibits, master's report, the exceptions thereto and the whole record," and the court confirmed the master's special findings of fact, but decreed that such facts entitle him to enrollment as a member of the tribe of Chickasaw Indians. (Rec., 24b.)

CHICKASAW NATION }  
                   *vs.* } No. 472.  
 A. B. HILL *et al.* }

The record in this case has been printed, and the court can see from that what the facts are.

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CHICKASAW NATION }  
                   *vs.* } No. 476.  
 DANIEL McDUFFIE *et al.* }

The applicants filed their application before the Dawes Commission, were rejected and appealed to the U. S. Court in Indian Territory. The case was referred to the Master in Chancery, who reported that the applicants were Chickasaw Indians by blood, except those who had married into the McDuffie family, and directed that all of the applicants be admitted as members of the Chickasaw tribe of Indians by blood, except Elizabeth McDuffie, J. M. Crawford, George Jarvis and William M. McCorley, and directed that they be admitted as members of the Chickasaw tribe of Indians by intermarriage, finding that they were all married prior to the passage of the Chickasaw marriage law. The Chickasaw nation filed exceptions to this report, and the Court, in March, 1898, confirms that report and ordered the applicants enrolled, as directed in the report. The report further showed that all of applicants were residents of the Chickasaw nation, and had been for a number of years, and that each head of the family had lands improved and were using them as members of the Chickasaw tribe of Indians. The evidence further showed that these applicants were admitted to citizenship in the Chickasaw nation by a committee appointed



for that purpose by the Governor of said nation, on the 14th day of February, 1895, but were rejected by the succeeding legislature of said nation.

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CHICKASAW NATION }  
                   *vs.* } No. 484.  
 EVANS HILL *et al.* }

The evidence in No. 472, which has been printed, applies to this case, except that the evidence in this case shows that Evans Hill and family were admitted to citizenship in the Chickasaw nation, by Chickasaw committee, on the 14th day of February, 1895, but were rejected by the next legislature of said nation.

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CHICKASAW NATION }  
                   *vs.* } No. 487.  
 U. S. JOINS *et al.* }

This application was filed before the Dawes Commission and rejected by it. Appealed to the U. S. Court, the master in chancery of said court reported that U. S. Joins and his daughter, Virgie Joins, were Chickasaw Indians by blood, and that his mother, Mrs. M. S. Joins, was a Chickasaw by intermarriage, and that U. S. Joins and family were admitted to citizenship in the Chickasaw nation by the citizenship committee, February 14, 1895, but rejected by the next legislature of said nation; that he has a large farm improved in the Chickasaw nation, holding it as an Indian, and that he drew his proportional part of the Chickasaw annuity money in 1893, and accordingly recommended their admission. The Chickasaw nation excepted to this report, the court confirmed the same and directed that they all be enrolled. The Chickasaw nation excepted and appealed to this Court.

CHICKASAW NATION  
 vs.  
 J. E. C. ALBRIGHT *et al.* } No. 490.

The master's report and evidence in this case showed that J. E. C. Albright was married to a Chickasaw Indian woman by blood, in compliance with the Indian law, on June 9, 1881, and lived with her until she died February 10, 1883; that he was married to the applicant, Lottie Albright, who was a white woman, and an American citizen, on March 22, 1885, and that he married her under the law of the Chickasaw nation and paid to the Chickasaw nation the sum of \$50 for his license in each case; that they are now living together as husband and wife in Indian Territory, have lands improved, as members of the Indian tribe and drew their part of annuity money in 1893, and that J. E. C. Albright has been a member of the Chickasaw legislature and has been at all times subject to their laws; he therefore recommended that J. E. C. Albright be admitted as an intermarried citizen, but recommended that his wife, Lottie, be rejected; both the applicants and the nation filed exceptions to this report, and the court, in December, 1897, upon a hearing of same, directed that they both be admitted as citizens of the Chickasaw tribe of Indians. The Chickasaw nation excepted and appealed to this Court.

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CHICKASAW NATION  
 vs.  
 GEO. P. LAFFLIN *et al.* } No. 493.

The evidence and the master's report shows that Geo. P. Lafflin was married to a blooded Chickasaw, February 12, 1878, and that he paid \$50 for his license and lived with her until she died, May 9, 1884; that he married the appli-

cant, Nancy A. Lafflin, who was a United States citizen, the 22nd day of December, 1893, and married her under the Chickasaw law, paying \$50 for the license; that there was born to them of this last union the applicant, Bertha Ann Lafflin. The Dawes Commission admitted Geo. B. Lafflin, but rejected Nancy A. Lafflin and Bertha Ann Lafflin. Both the Chickasaw nation and the applicants appealed to the trial court. The master recommended the admission of all the applicants; the Chickasaw nation excepted and the court, in December, 1897, confirmed the report and admitted all of the applicants to citizenship. The proof in the case shows that Geo. P. Lafflin had a large farm improved, holding it as a member of the Chickasaw tribe of Indians, and that he drew his part of the annuity money, in 1893. The Chickasaw excepted to the judgment of the District Court and appealed to this Court.

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CHICKASAW NATION	}	No. 494.
<i>vs.</i>		
A. H. LAW <i>et al.</i>		

The master's report and evidence show that A. H. Law was married to a Chickasaw Indian woman by blood, November 18, 1871, under the then existing Chickasaw law, and lived with her until her death, which was about thirteen years; that there was born to him of that union the applicant, M. E. Law, and that after the death of his first wife, he was, on the 10th day of October, 1886, married to the applicant, M. E. Law, under the Chickasaw law, paying \$50 for his license; that there was born of this last union the applicants, L. E. Law, Albert H. Law, Katie B. Law, and Charles H. Law. The evidence shows that the first M. E. Law mentioned herein is a daughter of A. H. Law, and is a Chickasaw by blood;

that the second M. E. Law mentioned is the wife of A. H. Law, and was married to him as above explained. The court upon final trial admitted all of these applicants to citizenship; the Chickasaw nation excepted and appealed to this Court. The evidence shows that A. H. Law has been County Judge of Pickens County, Indian Territory; has been Clerk of the Chickasaw District Court and held other offices in the Chickasaw nation; that he drew his proportional part of annuity money in 1893, and has lands improved, holding same as a Chickasaw Indian.

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CHICKASAW NATION }  
                   *vs.* } No. 495.  
       O. W. SEAY. }

The evidence and master of the court show that O. W. Seay married a Chickasaw Indian by blood, under the Chickasaw law, paying \$50 for his license, on the 26th day of August, 1887, and lived with her until her death, and then married a white woman, under the U. S. laws. The evidence shows that he has a large body of land improved and that he drew his part of the annuity money in 1893. The master recommended that he be admitted. The court confirmed the report in December, 1897. The Chickasaw nation excepted and appealed to this Court.

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CHICKASAW NATION }  
                   *vs.* } No. 498.  
       J. H. CORNISH *et al.* }

The evidence and the master's report show that J. H. Cornish was married to a blooded Indian April 30, 1890, under the Indian law, paying \$50 for his license; that he

lived with her until she died, October 7, 1890, and in April, 1894, was married to the applicant, Annie Cornish, under the U. S. law. By this union they have one child, Leland Cornish ; that he has lands improved in the Chickasaw nation, occupying them as an Indian and drew his part of annuity money in 1893. The court admitted J. H. Cornish, and his child, Lillian Cornish, but rejected his wife, Annie Cornish. The Chickasaw nation excepted and appealed to this Court.

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CHICKASAW NATION <i>vs.</i>	}	No. 502.
W. V. ALEXANDER <i>et al.</i>		

The evidence and master's report show that W. V. Alexander was married to a Chickasaw Indian by blood, April 15, 1865, under the then existing Chickasaw laws, and lived with her in the Chickasaw nation until her death, and was married to a white woman, the applicant, Mattie E. Alexander, under the then existing Chickasaw laws, February 24, 1874, and has children, issue of the last marriage, Perry D. Alexander, Bert Alexander, Sheb W. Alexander, Leslie Alexander and Robert Alexander. The evidence shows that W. V. Alexander has a large body of land improved in the Chickasaw nation, which he has been using as a member of the tribe, since 1865, and that he and his present wife and his then living children drew their portion of annuity money in 1893. The court, in December, 1897, admitted all of the applicants to citizenship. The Chickasaw nation excepted and appealed to this Court.

CHICKASAW NATION  
*vs.*  
 J. W. ARCHARD *et al.* } No. 505.

The evidence and master's report show that J. W. Archard was married to a Chickasaw Indian by blood, November 22, 1882, under the Chickasaw law, paying \$50 for his license, and lived with her until she abandoned him ; that he procured from her in the Chickasaw courts a divorce, and was married to the applicant, Martha A. Archard, a United States citizen, December 20, 1885, under the Chickasaw law, paying \$50 for his license, and have as the issue of this last marriage the applicant, Sarah Archard ; that J. W. Archard has lands improved in the Chickasaw nation, holding them as a member of the Chickasaw tribe, and drew his part of annuity money in 1893. The court directed that they all be admitted as citizens of the Chickasaw tribe of Indians. The nation excepted and appealed.

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CHICKASAW NATION  
*vs.*  
 B. J. VAUGHN *et al.* } No. 508.

The evidence and master's report show that B. J. Vaughn was married to an Indian woman by blood, under the Indian law, January 11, 1882, and lived with her until her death, and does not show whether he has since married ; that he had by this union with his Indian wife the applicants, Edward Vaughn, Grover C. Vaughn, Benjamin C. Vaughn and Oscar S. Vaughn. The Court directed that B. J. Vaughn be admitted as an intermarried citizen, and that Edward Vaughn, Grover C. Vaughn, Benjamin C. Vaughn and Oscar S. Vaughn be admitted as members of the Chickasaw tribe of Indians by blood. The Chickasaw nation excepted and appealed to this Court.

CHICKASAW NATION }  
                   *vs.* } No. 512.  
 W. T. LANCASTER. }

The evidence and master's report show that W. T. Lancaster married an Indian woman by blood, under the Chickasaw law, in June, 1891, paying \$50 for his license, and that he is still living with her and her right is not questioned. The court ordered him admitted as an intermarried citizen of the Chickasaw tribe. The nation excepted and appealed to this Court.

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CHICKASAW NATION }  
                   *vs.* } No. 521.  
 SARAH JONES *et al.* }

The master found that all of the applicants that were admitted in this case were members of the Chickasaw tribe of Indians by blood, and that they were all residents of the Chickasaw nation. The court confirmed this report and directed that they all be admitted as members of the Chickasaw tribe of Indians by birth. No intermarried citizens were admitted in this judgment. The Chickasaw nation excepted and appealed to this Court.

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CHICKASAW NATION }  
                   *vs.* } No. 522.  
 NELLIE WORTHY *et al.* }

This application was filed by Nellie Worthy, and her present husband,                   Worthy, for themselves and Annie James, daughter of Nellie Worthy by a former husband. The master recommended the admission of Annie James, but denied the admission of the other applicants. The evidence and master's report show and is admitted by the answer of the Chickasaw nation, that Annie James, the only one admitted herein, is a half-blood Chickasaw, but it is

claimed and the proof so shows that Annie's mother, the applicant, Nellie Worthy, was married to James, a full-blood Chickasaw Indian, and lived with him until he was killed, and that Annie James is the issue of this marriage. But the proof shows that the said James, at the time he was married to Nellie, had a living wife, from whom he had never been divorced, and Annie's right to citizenship is resisted by the Chickasaw nation, because of her being an illegitimate child. The court directed that she be admitted as a member of the tribe by blood. The nation excepted and appealed to this Court.

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CHICKASAW NATION	}	No. 525.
vs.		
WILLIAM A. ARNOLD <i>et al.</i>		

The master's report in this case shows that all of the applicants herein are Chickasaw Indians by blood. The evidence introduced by the applicants is not contradicted in any way by the nation. The master recommended that William A. Arnold and children and Chas. B. Arnold and children be admitted as members of the Chickasaw tribe of Indians by blood. The proof shows that they have all lived in the Territory for a number of years. The court confirmed this report and ordered them all enrolled as members of the Chickasaw tribe of Indians by blood. No one was admitted in this case as intermarried citizens. The Chickasaw nation excepted and appealed to this Court.

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CHICKASAW NATION	}	No. 531.
vs.		
DE WITT C. LEE <i>et. al.</i>		

The master's report in this case finds that all of the applicants are members of the Chickasaw tribe of Indians by blood, except the applicant, Mrs. Lou F. Lee, and finds that



she was married prior to the law of 1876, requiring a United States citizen to pay \$50 for a license to marry an Indian. The evidence introduced by the applicant in this case is uncontradicted in any way. The court admitted all of the applicants as Chickasaw Indians by blood, except Mrs. Lou F. Lee, and admitted her as an intermarried citizen. The evidence shows that all of the applicants were at the time of the filing of their application before the Dawes Commission citizens and residents of the State of Mississippi. The Chickasaw nation excepted to the judgment admitting the applicants and appealed to this Court.

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CHICKASAW NATION	}	No. 532.
<i>vs.</i>		
ANNIE J. HAMILTON <i>et al.</i>		

The finding of the master in this case is, that all the applicants, to wit: Annie J. Hamilton and her children—Robert Hamilton, Charles Hamilton, Albert Hamilton, John Hamilton, and Shelby Hamilton—are Chickasaw Indians by blood, and that they now live in the Choctaw nation. He recommended that they be admitted as such, the court confirmed this report and directed that they be enrolled as Chickasaw Indians by blood. The Chickasaw nation excepted and appealed to this Court.

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CHICKASAW NATION	}	No. 533.
<i>vs.</i>		
W. R. PITTMAN.		

The report of the master in this case and the evidence introduced show that the plaintiff, W. R. Pittman, married a Chickasaw woman by blood May 21, 1888, under the Indian law, paying \$50 for his license. There is no proof as to

whether this wife is living or dead. The master recommended that he be admitted as an intermarried citizen; the court confirmed the report and ordered him enrolled as an intermarried citizen of the Chickasaw nation. The nation excepted and appealed to this Court.

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CHICKASAW NATION }  
                   *vs.* } No. 503.  
 J. W. SPARKS *et al.* }

Dawes Commission admitted applicants' Appeal. Master found that applicant, J. W. Sparks, August 10, 1880, married Mrs. Susan Colbert, an Indian by blood, in accordance with Chickasaw laws; that as a result of this union there was born unto them a girl (yet living) July 18, 1883; said Sparks, in the Chickasaw courts, obtained a divorce from his said wife and recommended admission of applicant. Nation excepted to report, and on March 12, 1898, exceptions were overruled by the court. The report confirmed and court decreed that J. W. Sparks is a member of Chickasaw tribe, by intermarriage, and his daughter, Cynthiana, is a member thereof by blood, and directing their enrollment as such (29).

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CHICKASAW NATION }  
                   *vs.* } No. 509.  
 J. M. DORCHESTER *et al.* }

Dawes Commission admitted J. M. Dorchester and rejected Charlie, Fannie May and Mack Dorchester (13). Nation appealed (14 and 15). The master finds that applicant, J. M. Dorchester, in 1885, in compliance with the Chickasaw laws, was married to Rhoda Keel, a Chickasaw by blood. He was divorced from his wife, Rhoda, and in

1889, not in compliance with the Chickasaw laws, he was again married to May Miner, a citizen of the United States. As a result of the second marriage, the applicants, Charles, Fannie May and Mack Dorchester, were born. The master recommended that J. M. Dorchester be admitted as a member of the tribe by intermarriage, and that application of children be denied (17). Applicants denied citizenship excepted, and on March 12, 1898, the court, upon pleading, evidence and exceptions, decreed that J. M. Dorchester is a member of the tribe of Chickasaw Indians by intermarriage, and his said children are members thereof, and directed the Dawes Commission to enroll them as such (29).

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CHICKASAW NATION <sup>vs.</sup> WM. H. BIRCH <i>et al.</i> , J. W. HOWARD <i>et al.</i>	}	No. 517.
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Applications for enrollment denied by the Dawes Commission (14 and 15). Applicants appeal (16½ and 17). The master found, and so reported to the court, that all the applicants are *lineal* descendants of Lapomby, a Chickasaw Indian woman by blood, and her husband, Green Howard, a white man, except those who married into the family, and recommended that all the applicants by blood be enrolled as members of the tribe by blood, and that Wm. H. Birch, Marian J. Lowry, and Louisa J. Howard be enrolled as members thereof by intermarriage (21). Nation excepted to master's report; said exceptions, on March 23, 1898, were overruled by the trial court. Master's report confirmed, and applicants found to be members by the master were decreed to be members of the Chickasaw tribe, and Dawes Commission was directed to enroll them as such (33).

CHICKASAW NATION }  
                   vs.        }  
 W. P. BRADLEY *et al.* } No. 501.

Admitted by Dawes Commission. (Rec., 16). Nation appealed. The master found that applicant, Winter P. Bradley, was married to Texana Colbert, a Chickasaw by blood; after Texana's death he married a white woman, a citizen of the United States, and recommended that said Bradley be enrolled as a member of the Chickasaw tribe by intermarriage and other applicants (children by first marriage) be enrolled as members thereof by blood (Rec., 20). The court on March 12, 1898, confirmed the master's report and decreed that W. P. Bradley is a member of the tribe of Chickasaw Indians by intermarriage, and the other applicants are members thereof by blood and directed the Dawes Commission to enroll them as such. (Rec., 31).

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In all of the cases appealed to this Court from the U. S. Court in the Indian Territory, Southern District, wherever *the question of the applicants residence was involved*, that question was made an issue and was passed upon by the master and the court, but when no such defense was interposed by the nation, and no question of residence was raised, the master's reports and the final judgments of the court are *silent as to the question of residence*. To be more plainly stated, the master in his report, and the court in its final judgment, made no reference to the question of residence, where the evidence affirmatively showed that the applicants were residents of the nation to which they claimed citizenship. In all others the question was specially passed upon.

All the judgments in the foregoing causes were, by the court below, *rendered and made final prior to the 1st day of July, 1898*. And, although not disclosed by the record, it

is a fact the term of court at which said judgments were rendered had finally adjourned prior to July 1, 1898. The Indian appropriation bill, approved July 1, 1898, among other things, provided: "Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party *in all citizenship cases*, and in all cases between either of the Five Civilized Tribes and the United States involving the *constitutionality or validity* of any legislation *affecting citizenship* or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: Provided, that appeals in cases decided prior to this act must be *perfected in one hundred and twenty days from its passage*; and in cases decided subsequent thereto, within *sixty days from final judgment*; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or superseded by any proceeding in, or order of, any court, or of any judge, until after *final judgment* in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible." (U. S. Stat., 2nd session, 1897-1898, p. 591.)

Appellees contend that no appellate jurisdiction of said causes have attached to this Court, and therefore said causes should be dismissed from the Court's docket for the following reasons:

1st. Because the judgments appealed from were final and vested in the appellees the *vested and valuable right of Indian citizenship*, and as the act of Congress cited *supra*, was passed since the rendition of said judgments and is an attempt to confer upon this Court the power to reopen and retry said causes, said act is unconstitutional and void.

2nd. Because if said act confers upon this Court appellate

jurisdiction to pass upon said causes in any respect it gives to the Court the right only to enquire into, pass upon and determine the *constitutionality or validity* of the act of Congress of June 10, 1896, conferring upon the commission to the Five Civilized Tribes the right to pass upon and determine the citizenship of such tribes, and as such questions of law are not certified to this Court for its consideration, they cannot be considered by the Court.

3rd. Because the records herein were not filed with the clerk of this Court within one hundred and twenty days from July 1, 1898, and therefore the appeals herein were not perfected in accordance with said act of Congress.

In a recent opinion rendered by this honorable Court involving the question of citizenship, it was in effect held that the citizenship of a citizen of the United States is a vested right which cannot be impaired or divested by act of Congress or judicial decree. (U. S. *vs.* Wong Kim Ark.)

If that be the law, *a fortiori*, the citizenship of a Choctaw or Chickasaw Indian is beyond question a vested and valuable right, for the reason that such citizenship and the right of property are dependent the one upon the other and to destroy the one is a destruction of the other.

Prior to the act authorizing the Dawes Commission to make up a roll of citizens of the Five Tribes, the citizenship of such tribes was passed upon and determined by tribal courts, or committees, and from their decision appeals were taken to the Secretary of the Interior, whose decision, or that of the Attorney-General, seems to have been treated as final: In passing on the citizenship of a Cherokee citizen, whose right of citizenship had been passed upon by the chief justice of that tribe and decided in the applicant's favor, and wherein pursuant to an act of the Cherokee council a citizenship committee attempted to reopen and readjudicate the citizenship of such applicant, Attorney-

General Garland in an able opinion held the decision of the chief justice to be final and conclusive, and as Cherokee citizenship is a vested right the question could not be reopened and retried. (19 Opinion Attorney-General, 229.)

There being no fraud or mistake in the rendition of the judgments by the court below, in these cases, we submit the doctrine announced in the opinion of this Court in case of *Samperyac vs. U. S.* (7 Pet., 222), has no application herein.

But if this honorable Court should hold that the act in question is constitutional, then the query arises to what extent does the revisory jurisdiction of this Court go. Does it confer upon the Court the right to review the merits or evidence introduced in the court below, or does it extend only to the right of this Court to pass upon the *validity and constitutionality* of the act of June 10, 1896 (cited *supra*), conferring upon the Dawes Commission the right to make up a roll of citizens. If the language employed in the act, viz: "And in all cases between either of the Five Civilized Tribes and the United States," be eliminated from the act, or is followed by a comma, then the language of the act infallibly indicates that by such act Congress conferred upon this Court the right only to inquire into the *constitutionality or validity of legislation* affecting citizenship. But let the punctuation and the act remain as it is, then what does the act mean? But two classes of cases are mentioned, viz: (1) a case involving the constitutionality or validity of citizenship wherein the Indian nation and the applicant for citizenship are the only necessary parties, and (2) a case wherein the constitutionality or validity of legislation affecting the allotment of lands is involved wherein the United States is one and one of the tribes is the other necessary party. In the first case if either the nation or the applicant (the losing party) doubts the validity or constitutionality of the act of 1896, under

which a final judgment is rendered either granting or denying citizenship he or it may, by appeal, obtain the opinion of this Court upon such question.

Under the act of Congress, approved June 28, 1898, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," (U. S. Stat., 2nd Session 1897-1898, p. 495,) the allotment of the lands of the Five Civilized Tribes was provided for.

Section 11 of said act (*Id.*, p. 497) reads: "That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' shall proceed to *allot* the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same," etc.

The effect of this act of Congress was to coerce these tribes into an allotment of their lands in severalty without the assent of the tribes, unless the Choctaw and Chickasaw tribes should ratify the agreement theretofore entered into by the Dawes Commission and their commissioners which provided for allotment, Section 29, *Id.*, 505. So, therefore, on the 1st day of July, 1898, these five tribes were confronted by two conditions: 1st, to submit to the making of a complete roll of their citizenship by the Dawes Commission pursuant to act of Congress June 10, 1896; and 2nd, to submit to a coercive allotment of their lands pursuant to act of June 28, 1898 (*supra*), or to enter into agreements with said commission to allot the same. Under the first act by its express terms the judgment of the court granting or denying citizenship



was final, and the last act purported to allot lands through the Dawes Commission, and neither expressly or by implication recognized the right or power of the tribes to settle questions of citizenship or to allot their lands, but by these *acts of Congress* (this "*legislation*") the Dawes Commission, to the exclusion of the tribes, was given the right to pass upon and determine who were citizens or members of these tribes, and to allot their lands. The power or right of Congress to pass this *legislation* affecting the citizenship or the allotment of the lands of these tribes was questioned by the tribes, hence it is plain Congress, to settle the question of the *constitutionality or validity of its said acts affecting the citizenship of these Indians and the allotment of their lands*, attempted to refer the question to this Court for its consideration and final adjudication.

The records in these Choctaw cases were not filed with the clerk of the Court within 120 days from the passage of the act of July 1, 1898, and as the judgments in the court below were rendered prior thereto, we earnestly insist that none of the appeals herein have been "*perfected in 120 days*" from the passage of the act attempting to confer the right of appeal. (U. S. Stat., 1897-1898, 2nd Sess., 591.)

Paragraph 3, Rule 8 of this Court reads: "No case will be heard until a *complete record* containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, *shall be filed.*" It is no answer to the contention to say a writ of error or appeal allowed by the *court* perfects the appeal, but we submit the rules of this Court show such appeal is not recognized (not perfected) until a complete record is filed with the clerk. For the reasons stated we seriously but earnestly insist that these cases should be dismissed from the docket of the Court.

## II.

Counsel for the nation in his brief presents to this Court the question, "Can the United States determine who shall be a citizen of the Choctaw nation, or is that a right that rests exclusively in that nation?" And states the "Choctaw nation contends that the United States has not the right to determine who shall be citizens of that nation, but that this is a right that vests in that nation exclusively as the sovereign."

Without rehearsing the history of the Choctaw tribe, we submit that this and the remainder of the Five Tribes, and all other tribes, of Indians in the United States, have at all times been under the direct supervision and control of the United States Government, and the history of Choctaw citizenship shows that appeals have been allowed from the Choctaw and Chickasaw citizenship, courts or committees, direct to the Secretary of the Interior, and the decision of the Secretary has been treated as final.

In the Indian appropriation act of June 7, 1897 (U. S. Stat., 1897, 1st Sess., p. 83), the Dawes Commission is directed "to examine and report to Congress whether the Mississippi Choctaws, under their treaties, are not entitled to all the rights of Choctaw citizenship *except an interest in the Choctaw annuities*;" and the jurisdiction of the tribal courts are taken from the Five Tribes and conferred upon the United States Court in the Indian Territory, and said United States Court is given original and exclusive jurisdiction to "try and determine all civil causes in *law and equity* \* \* \* and all *criminal causes* for the punishment of any offense committed after January 1, 1898, by any person in said territory \* \* \* and the laws of the United States and the State of Arkansas in force in the Indian Territory" is made to "apply to all persons therein, *irrespective of race*, \* \* \* and any citizen of any one of said tribes otherwise

qualified who can speak and understand the English language may serve as a juror in any of said courts." In the act of June 27, 1898 (commonly called the Curtis Bill, see p. 495, U. S. Stat., 2nd Sess., 1897-8), in section 2 it is provided: That in the progress "of any civil suit, in law or equity, pending in the United States Court in any district in the Indian Territory, if it shall "appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

Section 3 (same act, p. 496): "That said courts" (meaning U. S. Courts) "are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold *as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the Five Tribes, or the United States Court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons, or nation or tribe of Indians, entitled to the possession of the same.*"

Section 11 same act (497): "That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the '*Dawes Commission*' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or

tribe susceptible of allotment among the citizens thereof, *as shown by said roll*, giving to each so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of the same," and providing that said commission after allotting said lands shall make full report thereof to the Secretary of the Interior for his approval."

Section 27 (same act, 504): "That on and after the passage of this act *the laws* of the various tribes or nations of of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

Section 28: "That on the 1st day of July, 1898, *all tribal courts in Indian Territory shall be abolished.*" and conferring jurisdiction upon the United States Court in the Indian Territory to try and determine all civil and criminal cases pending in the tribal courts after dates in the act mentioned.

Section 29 (same act, p. 505): "That the agreement made by the commission to the Five Civilized Tribes with commissions representing the *Choctaw and Chickasaw tribes* of Indians on the 23d day of April, 1897, *as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the 1st day of December, 1898, by a majority of the whole number of votes cast by members of said tribes at an election held for that purpose; \* \* \** and if said agreement *as amended* be so ratified, the provisions of this act *shall then only apply to said tribes where the same do not conflict with the provisions of said agreement.*"

To the act of Congress last cited said amended agreement is subjoined. (Same act, pp. 505 to 513.)

It will not be denied but that the Choctaw and Chickasaw tribes by a majority vote adopted and ratified said amended agreement within a few months after the act of Congress of June 28, 1898 (cited), was passed. This agreement provides for a complete allotment of "all the lands

within the Indian Territory belonging to the Choctaw and Chickasaw Indians to the *members* of said tribes so as to *give to each member \* \* \** as far as possible a fair and equal share thereof." (*Id.*, 505.) It gives to each member the preferred right to select his allotment upon lands where his improvements are situated, which improvements are not to be valued or estimated. (*Id.*, 507.)

It expressly states, "That *all controversies arising between the members of the said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.*" (*Id.*, 507.)

"That the *United States* shall put *each allottee* in possession of his allotment and remove all persons therefrom objectionable to the allottee." (*Id.*, 507.) This agreement provides, "that as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw nation and the governor of the Chickasaw nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land." (*Id.*, 507.)

"That the *United States* shall provide by law for proper records of land titles in the territory occupied by the Choctaw and Chickasaw tribes." (*Id.*, 508.)

This agreement provides for the laying out, mapping, and establishing town sites in the Choctaw and Chickasaw nations, and sale of town lots in said towns, the work to be done by an Indian commission to be appointed by the executive of each of said nations, and commission to be appointed by the President in each of said nations; the purchase money of such sales to be deposited in the Treasury of the United States; said moneys to be deposited for the ben-

efit of the members of the Choctaw and Chickasaw tribes. (*Id.*, 508-9.) All royalty upon mines is to be paid into the United States Treasury, and shall be drawn therefrom subject to the rules and regulations to be prescribed by the Secretary of the Interior. (*Id.*, 510.)

It confirms all leasehold interests "in any oil, coal rights, asphalt, or mineral *which have been assented to by act of Congress.* (*Id.*, 510.) It gives to the Secretary of the Interior the right to increase or diminish royalty on coal, etc. (*Id.*, 510), and the following stipulations are found therein: "It is further agreed that the *United States Courts* now existing, or that may hereafter be created, in the Indian Territory, *shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes* \* \* \* *and in all said civil suits said courts shall have full equity powers; and whenever it shall appear to said court, at any stage in the hearing of the case, that the tribe is in any way interested in the subject-matter in controversy, it shall have power to summon in said tribe and make the same a party to the suit and proceed therein in all respects as if such tribe were an original party thereto.*" (*Id.*, 511-12.) "It is further agreed, in view of the modification of *legislative authority and judicial jurisdiction* herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that *the same shall continue for the period of eight years from the fourth day of March, 1898. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be construed to be in*

*any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."* (*Id.*, 512.)

The commission to the Five Tribes (now known as the "Dawes Commission") was created by the Indian appropriation bill of March 3, 1893 (27 Stat., 645), and were authorized by said act to visit the Five Civilized Tribes and negotiate with them for the allotment of the lands in the Indian Territory between the members or citizens of such tribes. Acting under said appointment said commission visited said Five Tribes, and after repeated efforts to negotiate with them did on November 20, 1894, and on November 15, 1895, make reports to the Congress of the United States of their progress and of the condition of affairs existing in said tribes as to the manner in which lands were held by the members, and the manner in which the citizenship of said tribes was dealt with.

In their report of November 20, 1894, this commission reported to Congress the condition of affairs in the Indian Territory (see Miscellaneous Senate Document No. 24, 53d Congress, 3d Session).

And on November 15, 1895, said commission made another report to Congress, and among other things said :

"It can not be possible that in any portion of this country government, no matter what its origin, can remain peaceably for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the

Territory this attempt of a fraction to dictate terms to the whole has already reached its limit, and, if left without interference, will break up in revolution. The Chickasaw nation, in its zeal to confine within the narrowest limits and to the smallest number all privileges and rights, as well as participation in the government, and to weed out as many as possible of the uneasy, has enacted the following confiscation law :

“ ‘AN ACT to amend an act in relation to United States citizens procuring license to marry citizens of this nation.

“ ‘SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That an act in relation to United States citizens procuring license to marry citizens of the Chickasaw Nation be amended thus :

“ ‘SEC. 2. *Be it enacted*, That all United States citizens who have heretofore become citizens of the Chickasaw Nation or who may hereafter become such by intermarriage and be left a widow or widower by the decease of the Chickasaw wife or husband, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry another United States citizen, man or woman, as the case may be, having no right of Chickasaw citizenship by blood ; in that case all his or her rights as citizens shall cease and shall forfeit all rights of citizenship in this nation.

“ ‘SEC. 3. *Be it further enacted*, That whenever any citizen of this nation, whether by birth or adoption or intermarriage, shall become a citizen of any other nation or of the United States or any other Government, all his or her rights of citizenship of this nation shall cease, and he or she shall forfeit all the land or money belonging to the Chickasaw people.

“ ‘SEC. 4. *Be it further enacted*, That the rights and privileges herein conferred upon United States citizens by intermarriage with the Chickasaws shall not extend to the right of soil or interest in the vested funds belonging to the Chickasaws, neither the right to vote nor hold any office in this nation. All parts of acts coming in conflict with this act are hereby repealed, and that this act take effect from and after its passage.



“ ‘ Approved, October 1, 1890.

“ ‘ I hereby certify that the above is a true and correct copy of the original act now on file in my office.

“ ‘ Given under my hand and seal this the 18th day of October, 1895.

“ ‘ L. S. BURRIS,

“ ‘ *National Secretary, Chickasaw Nation.*’

“ It will be observed that among the other penalties here imposed the third section forbids on pain of confiscation any Indian citizen to apply under existing United States laws for United States citizenship, and thus gain a right to enter United States courts for vindication of his rights or avail himself of any anticipated authority conferred on that court to partition the common lands of the nation.

“ The anticipated enforcement of this act has caused great consternation and excitement among a considerable number of residents in the Chickasaw nation who were, up to its enactment, admitted citizens, enjoying all the rights accorded to any citizen, and possessed, some of them, of very large property interests in the nation. Preparation is being made by the authorities of the nation for its enforcement, and notice to quit is being served upon those to whom it applies. In the meantime threats of open resistance are rife. The resolutions of a secret organization among those whose property is by this act confiscated have been laid before the Commission, in which the determination is avowed ‘ in the event that Indian officials undertake to carry out this law to exterminate every member of this council from the chief down.’ The commission is appealed to for relief, but without power to interpose they can only bring this critical condition of affairs to the attention of the United States Government as one among the many reasons for immediate Congressional action.

#### “ CHEROKEE CITIZENSHIP.

“ Citizenship in these nations has been left by the National Government entirely under the control of the authorities in the several existing governments.

“ The citizenship roll of the Cherokees has dealt with a larger number than any of the others, affecting as it does

all North Carolina Cherokees who desire to become a part of the nation, and a more liberal policy of adoption by intermarriage and otherwise than exists in the other tribes.

"A tribunal was established many years ago for determining the right of admission to this roll, and it was made up at that time by judicial decision in each case. Since that time and since the administration of public affairs has fallen into present hands, this roll has become a political football, and names have been stricken from it and added to it and restored to it, without notice or rehearing or power of review, to answer political or personal ends and with entire disregard of rights affected thereby. Many who have long enjoyed all the acknowledged rights of citizenship have, without warning, found themselves thus decitizenized and deprived both of political and property rights pertaining to such citizenship. This practice of striking names from the rolls has been used in criminal cases to oust courts of jurisdiction depending on that fact, and the same names have been afterwards restored to the roll when that fact would oust another court of jurisdiction of the same offense. Glaring instances of the entire miscarriage of prosecutions from this cause have come to the knowledge of the Commission and cases of the greatest hardship affecting private rights are of frequent occurrence. This practice is persisted in, in defiance of an expressed opinion of the Attorney-General of the United States forwarded to this nation on a case presented that it was not in their power to thus decitizenize one who has been made a citizen by this tribunal clothed by law with the authority. There is no remedy but an interference of the United States.

"The 'intruders' roll' is being manipulated in the same way. This 'intruders' roll' is the list of persons whose claim to citizenship is denied by the nation, and who by the agreement in the purchase of the 'Cherokee Strip' the United States are to remove from the Territory by the 1st of January next. This roll is now being prepared for that purpose by the Cherokee authorities, in a manner most surprising and shocking to every sense of justice, and in disregard of the plainest principles of law. The chief assumes to have authority to 'designate' the names to be put upon

the intruders' roll, and names are, by his order, without hearing or notice, transferred from the citizens' roll to that of intruders, so that, on January 1, 1896, the United States will be called upon to remove from the territory, by force if need be, thousands of residents substantially selected for that purpose by the chief of the nation. It has been made clear to the Commission that the grossest injustice and fraud characterize this roll. Persons whose names have been upon the citizens' roll by the judicial decree of the tribunal established by law for that purpose for many years, some of them for twenty or more, persons who have enjoyed all the rights of citizens, unquestioned by anyone until distribution per capita of the strip money, have been by the mere 'designation' of the chief stricken from the citizens' roll and put upon that of intruders, with notice to quit before January next. Children of such parents, born in the nation, now of age, with families and homes of their own, are receiving this notice to leave forever all they have earned and the homes they have built for themselves, and this at the will of the chief alone. If the United States Government removes such persons it will become a participant in this fraud and injustice, for which ignorance alone can form any excuse. The Commission feel it a duty to call attention to these facts, and invoke the direct intervention of the Government to prevent the consummation of this great wrong.

"These remarks apply specially to the Cherokee Nation, with which the United States has recently entered into obligations in respect to 'intruders.' But much of what is here said is applicable also to the condition of affairs in the other nations. In these nations many persons coming to the territory by invitation of the governments themselves, or under the provisions of the laws enacted by them, and acquiring citizenship, with homes and property, in conformity to such laws, have been in many instances stricken from the rolls of citizenship by those in power, for political and personal purposes, and laws enacted and other means resorted to to deprive them of the homes and property acquired.

"The Commission is of the opinion that if citizenship is

left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

(See Senate Document No. 12, 54th Congress, 1st session, pp. 14 to 17.)

Under the condition of affairs, as reported by this commission, we submit it was not only the right but the duty of Congress to confer upon it, as was afterwards done, the power to make a correct roll of the citizenship of each of the Five Civilized Tribes to the end that each member thereof would be protected in this his valuable right of citizenship. As the relation of the United States to these tribes is that of guardian to ward, when the Government was advised of the palpable frauds committed by those of political preferment among the tribes in the way of decitizenizing its own citizens, and thus forfeiting their interest in the joint estate, to our minds it was high time the guardian, through the agency of Congress, should have interposed its objection and arranged an adjustment of these gross wrongs, as it afterwards attempted to do.

### **Jurisdiction of Lower Courts.**

Counsel for appellee, Choctaw nation, orally argued that the United States Court in the Indian Territory, Southern District, had no jurisdiction upon appeal from the Dawes Commission to pass upon and finally decide the applications of Choctaws to be enrolled, because he insisted the Choctaw nation is situated in the Central and the Chickasaw nation the Southern District of the Indian Territory.

That portion of the act granting the right of appeal from the decision of the Dawes Commission in citizenship cases reads: "*Provided*, that if the tribe, or any person, be aggrieved

with the decision of the tribal authorities or the commission provided for in this act, *it or he* may appeal from such decision to *the United States District Court*: *Provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.*" (U. S. Stat., 1st Sess., 54th Cong., 1895-6, p. 339.)

This act prescribed no rules of practice or procedure to govern either the commission or the "*United States District Court*" in the trial of these citizenship cases. At the date of its passage there was no *United States District Court* in this Territory, nor was there such a court in the States of Texas or Arkansas by that technical and literal name. The United States Court held at Fort Smith, Ark., is the "United States District Court for the Western District of Arkansas," and the court held at Paris, Texas, is the "United States District Court for the Eastern District of Texas," and the court in the Indian Territory is the "United States Court in the Indian Territory." Now, what did Congress mean by the term, "the United States District Court"?

March 1, 1889, Congress by act then passed, entitled "An act to establish a United States Court in the Indian Territory, and other purposes." (25 Stat., 783.)

Section 1. "That a *United States Court is hereby established, whose jurisdiction shall extend over the Indian Territory*" (defining boundaries), and providing for appointment by the President of a judge, marshal and attorney for said court.

Section 7 provides that *two terms* of said court shall be held each year at *Muskogee*, in said Territory, on *first Monday in April and September*, and such *special sessions* as may be necessary for the dispatch of business in said court at such times as the judge may deem expedient. (*Id.*, 784.)

May 2, 1890, Congress on that date passed an act entitled, "An act to provide a temporary government for the

territory of Oklahoma, to enlarge the jurisdiction of *the United States Court in the Indian Territory*, and for other purposes." (26 Stat., 81.)

Section 30 of which reads:

"That for the purpose of *holding terms of said court*, said Indian Territory is hereby divided into three divisions; to be known as the *first, second and third divisions*;" defining each of the said divisions; naming places in each division where court shall be held, and provides the "*judge of said court shall hold at least two terms of said court each year in each of the divisions aforesaid, at such regular times as such judge shall fix and determine.*" (*Id.*, 94.)

March 18, 1895, Congress passed an act entitled "An act to provide for the appointment of additional judges of *the United States Court in the Indian Territory.*" (28 Stat., 693.)

Section 1. \* \* \* "That the territory known as the Indian Territory, now within the jurisdiction of the United States Court in said territory, is hereby divided into three judicial districts, to be known as the Northern, Central and Southern Districts, and at least two terms of the United States Court in the Indian Territory shall be held each year at each place of holding court in each district at such regular times as the judge for each district shall fix and determine. The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency, and the townsite of the Miami Townsite Company. \* \* \* The Central District shall consist of all the Choctaw country. \* \* \* The Southern District shall consist of all the Chickasaw country." This act, also, provides for the appointment of two additional judges for said court, giving to each district a judge. In the Indian appropriation bill of June 7, 1897,

Congress made provision for the appointment of still another judge for this court, and this judge under the act is judge of none of the districts, but is required to hold court in any of the districts, at any place of holding court therein, to which the Court of Appeals of that territory may assign him. (U. S. Stat., 1st Sess., 55th Cong., 1897, p. 84.)

By the acts of Congress (cited above) it is seen that the court in this territory is designated as the "United States Court in the Indian Territory;" that this court consists of four judges, one for each district, and a *supernumerary* judge, any one of whom has the power or right to hold terms of court in any of the three districts in said territory.

It will not do to say that the *venue of the nation* (the *territory embraced by it*) entitled the nation, or requires the applicant for citizenship, to appeal to a United States court held in *that* nation. Because no provision has ever yet been made by Congress for holding a term of the United States Court in the Indian Territory in the *Seminole nation*—one of the nations of the Five Civilized Tribes. It will not do to say that Congress, by the appeal clause, intended to require the appellant to take his case to that branch of the said United States Court held where the *nation* resides. Because by said act of Congress the *residence* of the *nation* or *applicant* does not determine the jurisdiction of the court to which these appeals were taken.

The records, will show that all who applied to the commission to be enrolled as Choctaw citizens (except non-residents of the Indian Territory), and who appealed from the decision of the commission to the United States Court in the Indian Territory, *Southern District*, were *bona-fide* residents of the Chickasaw nation. The rules of practice established by the Dawes Commission (which were followed by us) required that all claiming the right to be enrolled as mem-

bers of the tribe and embraced in one family, *should be included in one application*. In many of these applications the residence of applicants necessarily was not the same. Some resided in the Chickasaw, some the Choctaw nation, whilst others resided without the limits of the Territory. In construing what Congress meant by the "*United States District Court*" we take it that the technical construction insisted on by counsel for appellant will hardly receive the serious consideration of the Court when the question is viewed in the light of the doctrine announced in—

*Ex parte Cooper*, 143 U. S., 239 ; Do. 138 U. S.; 997 ;  
*Mackey vs. Cox*, 18 How., 299 ;  
*Boudinot vs. U. S.*, 78 U. S., 227.

### **Classification of Choctaws and Chickasaws.**

- A. Citizens by intermarriage and by adoption.
- B. Citizens by blood (resident and non-resident).

We will first consider the citizens by intermarriage and adoption.

The latter portion of article 1 of the treaty of 1855, between the United States and the Choctaws and Chickasaws, reads :

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common ; *so that each and every member of either tribe shall have an equal, undivided interest in the whole : Provided, however, That no part thereof shall ever be sold without the consent of both tribes ; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same.*" (11 Stat., 612.)

Article 2 of the same treaty reads :

"A district for the Chickasaws is hereby established, bounded as follows, to wit : Beginning on the north bank of



Red river, at the mouth of Island bayou, where it empties into Red river, about twenty-six miles on a straight line, below the mouth of False Wachitta; thence running a northwesterly course along the main channel of said bayou, to the junction of the three prongs of said bayou, nearest the dividing ridge between Wachitta and Low Blue rivers, as laid down on Captain R. L. Hunter's map; thence northerly along the eastern prong of Island bayou to its source; thence due north to the Canadian river; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red river, and thence down Red river to the beginning: *Provided, however*, If the line running due north, from the eastern source of Island bayou, to the main Canadian, shall not include Allen's or Wapanacka academy, within the Chickasaw district, then an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district north, west and south from the lines of boundary." (11 Stat., 612.)

Article 4 of the same treaty reads:

"The government and laws now in operation and not incompatible with this instrument, shall be and remain in full force and effect within the limits of the Chickasaw district, until the Chickasaws shall *adopt a constitution and enact laws, superseding, abrogating, or changing the same*. And all judicial proceedings within said district, commenced prior to the adoption of a constitution and laws by the Chickasaws, shall be conducted and determined according to existing laws." (11 Stat., 612.)

Article 7 of the same treaty reads:

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over person and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or mem-

bers of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families—those peacefully traveling or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes."

It will be seen that under the treaty of 1855 the Chickasaws were granted the right to establish and maintain a government of their own when they should, pursuant to such treaty, adopt a constitution and enact laws for that purpose, and, pursuant to such treaty, in the year 1856 the Chickasaws did adopt a constitution, section 11 of which reads:

"SECTION 11. The legislature shall have the power, by law, to admit, or adopt any person to citizenship in this nation, except a negro or descendant of a negro: *Provided, however,* That such an admission or adoption shall not give a right further than to settle and remain in the nation and to be subject to its laws."

Pursuant to this treaty and this constitution thus adopted on the 17th day of October, 1856, the legislature of the Chickasaw nation, at its first term, passed an act as follows:

"AN ACT granting citizenship to the heirs of Wm. H. Bourland.

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation,* That the right of citizenship is hereby granted to the following-named children and nephews of Wm. H. Bourland: Nancy, Amanda, Matilda, Gordentia and Run Hannah. Approved October 17, 1856. C. Harris, governor."

After the treaty of 1855 and the adoption of the Chickasaw constitution of 1856, and the passage of the act of October 17, 1856, adopting the Bourland heirs as citizens of the Chickasaw nation, the United States Government, on April 28, 1866, entered into a new treaty with the Choctaw and Chickasaw Indians, article 38 of which reads :

"Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw." (14 Stat., 779.)

Article 11 of the same treaty provides for surveying and dividing the lands of the Choctaws and Chickasaws in severalty ; the establishment of a land office. Article 12 provides for the mapping and surveying of the lands. Article 13 provides for notices to be published to those interested to the end that they may appear at the land office and examine such maps, etc., and articles 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, all pertain to the allotment of the Choctaw and Chickasaw lands and the granting to each member of the tribe his interest therein in severalty ; and article 26 of said treaty reads :

"The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such." (11 Stat., 777.)

Pursuant to the treaty of 1866, the Chickasaw nation, on August 16, 1867, adopted a constitution, section 7 of which under the head of "General Provisions," reads :

"All persons, other than Chickasaws, who have become citizens of this nation, by marriage or adoption, and have

been confirmed in all their rights as such by former conventions, and all such persons as aforesaid, who have become citizens by adoption by the legislature, or by intermarriage with the Chickasaws, since the adoption of the constitution of August 18, A. D. 1856, shall be entitled to all the rights, privileges and immunities of native-born citizens. All who may hereafter become citizens, either by marriage or adoption, shall be entitled to all the privileges of native-born citizens, without being eligible to the office of governor." (See page 15, Constitution, Laws, and Treaties of the Chickasaws, as published in 1878.)

Under the head of "Bill of Rights," in the same constitution, on page 5 of the same book, we find section 14, which reads:

"The legislature shall pass no retrospective law, or any law impairing the obligation of contracts."

On November 9, 1866, the legislature of the Chickasaw nation passed an act confirming the treaty of 1866 between the United States and the Choctaws and Chickasaws, section 1 of which reads:

*"Be it enacted by the legislature of the Chickasaw nation, That whereas a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby give its consent to and confirm the said treaty and amendments made by the Senate of the United States."*

On October 7, 1876, the legislature passed another act with reference to the Bourland heirs in language as follows:

"AN ACT granting citizenship to the heirs of William H. Bourland.

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation, That the right of citizenship is hereby granted to the following-named children and nephews of William H.*

Bourland : Amanda, Matilda, Gordentia, and Run Hannah. Approved Oct. 7th, 1876. B. F. Overton, governor." (Constitution, Laws, and Treaties of Chickasaws, page 76, as published in 1878.)

This act of October 7, 1876, is but a confirmation of the act of October 17, 1856, adopting the heirs of William H. Bourland as citizens of the Chickasaw nation. In effect, it is a declaratory statute.

Long after the treaty of 1866 and the adoption of the Chickasaw constitution pursuant thereto, in 1867, and the passage of the declaratory statute by the Chickasaw legislature in 1876, and on October 11, 1883, the legislature of the Chickasaw nation passed an act which reads :

"SECTION 1. *Be it enacted by the legislature of the Chickasaw nation*, That the right of citizenship granted to the following-named children and nephews of Wm. H. Bourland : Amanda Matilda, Gordentia and Run Hannah, approved October 7, 1876, the same is hereby repealed and annulled.

"SECTION 2. *Be it further enacted*, That the Governor is hereby directed and required to remove said parties and their descendants beyond the limits of this nation and that this act take effect from and after its passage."

In construing the last-named act of the Chickasaw legislature, this honorable Court in *Roff vs. Burney*, 168 U. S. (L. Ed.), 442, said :

"Now, according to this complaint, plaintiff was a citizen of the United States. Matilda Bourland was not a Chickasaw by blood, but one upon whom the right of Chickasaw citizenship had been conferred by act of the Chickasaw legislature.

"*The citizenship which the Chickasaw legislature could confer, it could withdraw.* The only restriction on the power of the Chickasaw nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution

or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. The Chickasaw legislature, by the second act, whose meaning is clear, though its phraseology may not be beyond criticism, not only repealed the prior act, but canceled the rights of citizenship granted thereby, and further directed the governor to remove the parties named therein and their descendants beyond the limits of the nation. This act was not one simply taking effect as of the date of its passage, and then withdrawing rights admitted to have been theretofore legally granted, but was retroactive in its scope, and purported to annul and destroy all that has ever been admitted to be done in respect to the matter. *Whether any rights of property could be taken away by such subsequent act need not be considered. It is enough to hold that all personal rights founded on the mere status thus created by the prior act fell when that status was destroyed."*

In this case property rights of Roff were not presented to and considered by this honorable Court in connection with his right of citizenship.

If it be true that the right of Chickasaw citizenship is a personal and not a valuable and vested right, then the language of this Court indicating that the Chickasaw legislature had the right to withdraw and abrogate Chickasaw citizenship is unquestionably true; but we must respectfully submit that under the treaty of 1866, articles 26 and 38, above referred to, and under the constitution of the Chickasaw nation of 1867, that he who acquired Chickasaw citizenship by legislative adoption or by intermarriage, not only became a member of the tribe of Chickasaw Indians, but became a tenant in common with the balance of the tribe in the lands of the Chickasaw Indians held in common with the Choctaw Indians and situated in the Choctaw and Chickasaw nations, and that to destroy the right of citizen-

ship is a destruction of the right to occupy and use the lands as a tenant in common with the balance of the tribe.

It is a destruction of his right to take his portion of the land in severalty when the lands are divided in accordance with the treaty of 1866, or the more recent treaty of the Choctaws and Chickasaws, entered into by their legislatures and confirmed by vote, cited above. We contend that the right of Chickasaw and Choctaw citizenship and the right of property, and the right to allotment are inseparable rights, and that the destruction of the right of citizenship absolutely destroys the right of property, a vested right; that the two rights cannot be separately treated, and we do not understand from the opinion of this Court in the Roff case that it was its intention to destroy any property right of Roff, acquired by virtue of his Chickasaw citizenship, but simply to destroy a personal right.

It will be seen that prior to the treaty of 1866, the status of an adopted Chickasaw or Choctaw Indian and one who acquired his citizenship by intermarriage with a member of the tribe, are entirely different to the status of a Chickasaw or Choctaw Indian since the treaty of 1866. The constitution of the Chickasaws of 1856, section 11 of which is quoted above, confers upon the adopted Chickasaw a right only to reside in the Chickasaw nation; but when the Government of the United States treated with the Chickasaws and Choctaws in 1866 they required of them an express stipulation, as contained in article 38 of said treaty, that the white person who has married into the tribe and resides in the Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities is to be deemed a member of said nation in all respects as though he was a native Choctaw or Chickasaw, and in article 26 of the same treaty it required these tribes of Indians by express stipulation to give to the intermarried

Chickasaw or Choctaw, or to the adopted Chickasaw or Choctaw, the same right of allotment as granted to the native Choctaw or Chickasaw, and we take it that the right thus granted to the intermarried or adopted citizen by the treaty is a valuable and vested right, and after it has once attached it cannot be divested by legislation or judicial decree. It is not simply a personal right to which there is no value attached, but it is a right upon which, or by virtue of which, the citizen acquires a vested right in property as a tenant in common with the balance of the tribe, and the vested right to take his portion of the land in severalty when such lands are divided among the members of his tribe, and on account of the treatment of the Indian tribes in refusing to recognize the treaty and vested rights of the intermarried and adopted Indian, the Congress of the United States provided that the commissioners of the United States to the Five Civilized Tribes of Indians, known as the Dawes Commission, "is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be admitted and enrolled."

Under this act of Congress above quoted all *bona fide* members of the tribe of Chickasaw or Choctaw Indians, who acquired their membership or citizenship by legislative adoption or by intermarriage, had the right to apply to the Dawes Commission to have their names enrolled as members of the tribe to which they belong, and if the evidence showed that they were members of the tribe in accordance with the laws and treaties, then the commission should enroll their names as members of such tribe; if the application was denied, the applicants had the right under this law to appeal to the United States court in the Indian Territory and there present his application and evidence for the decision and adjudication of such court.



It is contended by counsel for appellant that the citizenship of A. B. Roff by virtue of the act of 1883, being but a personal right, was withdrawn by that act.

To our minds there can be no question but that the right of Chickasaw citizenship, under the treaties and under the constitution above quoted and the laws of the Chickasaw nation, is a vested and valuable right, and carries with it a property right, which is inseparable from the right of citizenship, and that the destruction of the right of Chickasaw or Choctaw citizenship *ipso facto* is a destruction of the right of property granted to the intermarried and adopted Chickasaw or Choctaw citizen by the terms of the treaty of 1866 and confirmed by the constitution of the Chickasaws of 1867; but if it be admitted that the right of citizenship thus acquired by Roff by intermarriage with Matilda Bourland can be withdrawn by the Chickasaw legislature, we would respectfully call this Court's attention to the Chickasaw constitution of 1867, cited above, which reads:

"The legislature shall pass no retrospective law, or any law, impairing the obligation of contracts."

The record in the Roff case shows his wife died long prior to act of 1893.

Then what did the Chickasaws mean by this section of the Constitution? Evidently it was intended that the legislature of the Chickasaw nation could not pass any retroactive law. In defining the word "retrospective" and "retroactive" it is said that retroactive or retrospective means affecting what is past; operating upon a past event or transaction. Retrospective is the more common. Any statute which takes away or impairs vested rights acquired under existing laws, or creates a new law imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed must be treated as retro-

spective. (Anderson's Dictionary of Law, page 897, and authorities cited.)

So it will be seen that not only was the act of 1883 of the Chickasaw legislature contrary to and in violation of the terms of the treaty of 1866, but it was directly in contravention with the Chickasaw constitution of 1867, and void for that reason. The treaties between the United States Government and the Choctaw and Chickasaw tribes must be treated as a statute of the United States, because none of them are effective until they are enacted into a law. It would, indeed, be a harsh and unjust decision to hold that the white man who came to the Chickasaw nation upon invitation of the Chickasaw Indians and pursuant to the treaty of 1866, and who married a member of the tribe in 1867, and acquired the right of citizenship by virtue of such marriage, and who has resided continuously in the Chickasaw nation since said dates and acquired property rights and varied interests as the result of his energy and enterprise, by an act of the Chickasaw legislature is to be deprived of his right of citizenship and his right of property thus acquired upon such right of citizenship, and that, too, without the consent of the United States Government, a party to the treaty, under the terms of which he was granted a right of Chickasaw citizenship which carried with it all the rights of a member of the tribe of Chickasaw Indians by blood.

We do not contend that the opinion of this Court in the Roff-Burney case can be construed to mean that Roff by reason of such act of the legislature is deprived of any right except a personal right; but for the reason that Roff in said cause alleged in general terms that his right of Chickasaw citizenship was acquired under the treaties made by the Chickasaws and Choctaws and under the constitution and laws of the Chickasaw nation, we take it that this honorable Court in said cause did not consider those portions

of the treaties and the constitution of the Chickasaws which showed plainly that Roff's right of Chickasaw citizenship and right of property are inseparable, and to withdraw and abrogate the one is an absolute destruction of the other. It may be, and as far as our researches have gone it is a fact, that this question of vested rights, as applied to the right of Chickasaw and Choctaw citizenship, was never before presented to this tribunal for its consideration and adjudication; but until recently questions of this kind under the law were settled by decisions rendered by the Attorney-General of the United States, at instance of Secretary of Interior and in a letter written by Attorney-General Garland and addressed to the Secretary of the Interior, dated January 23, 1889, a full discussion of the right of Cherokee citizenship is found, and in that letter the Attorney-General says:

"I find from the papers submitted no authority to supervise this act of the Chief Justice, and I certainly think there is none. The right of citizenship is determined in this proceeding and becomes an adjudicated matter, and to leave it an open question for review by the legislature, or the counsel or other authority, would be to unsettle every right of citizenship established under that act.

"In this, as in all other things, there must be a termination and ending somewhere. A proper construction of this act is that the judgment of the Chief Justice rendered according to the terms of such act is the final determination and serves nothing for review. *These principles of law would apply, if possible, with more force here than in ordinary cases, because it appears from the papers submitted that the Cherokee council invited the North Carolina Cherokees to come to the Cherokee nation and to become identified therein as citizens, and this plan of making them citizens was adopted to carry out the purpose of an invitation; and it therefore follows as a consequence, in reply to your second inquiry, that the Department of the Interior is under no laws to respect the decision of the Cherokee authorities in pursuance to the right of a*

commission established by the Cherokee legislature to inquire into the claims of citizenship of those persons *adjudged to be citizens as designated in the first-named inquiry. The right of citizenship cannot be forfeited by legislative act, directly and indirectly, no more than can be the right of property.*" (19 Opinions Attorney-General, page 233.)

On pages 45 to 59 of brief filed in case No. 496, Chickasaw Nation *vs.* Wiggs, the Hon. Halbert E. Paine, attorney for the Chickasaws, calls the attention of this Court to cause No. 469, Chickasaw Nation *vs.* A. B. Roff *et al.*, who were adjudged to be members of the tribe of Chickasaws by the court below. On page 46 of his brief he copies *ex parte* affidavit of Overton Love filed against Roff's application for citizenship, and states this affidavit shows the facts connected with the adoption of the Bourland heirs (to one of whom Roff was married years ago), but to this statement we must dissent.

September 7, 1896, A. B. Roff, for himself and two minor children (Walter and Mabel), and his two married daughters (Mrs. Clary and Mrs. Williams), and their husbands and children, and Leon, his adult son, filed application with Dawes Commission to be enrolled as members of the tribe of Chickasaw Indians, as follows (see printed Record, 3 to 5):

*Application of A. B. Roff and His Children and Grandchildren to Have Their Names Placed upon the Roll of Citizenship as Members of the Tribe of Chickasaw Indians.*

The undersigned petitioners, A. B. Roff, and Walter Roff and Mabel Roff, minors and children of A. B. Roff, by A. B. Roff as next friend, and Mrs. Matilda Clary and G. E. Clary and Leonard B. Clary and Emma Fay Clary, minors, by their mother and next friend, Matilda Clary, and Mrs. Alice Williams and her husband, George Williams, and Inez Williams, a child of Alice and George Williams, by her mother and next friend, Alice Williams, and Leon Roff,

represent and show to this honorable commission that they and each of them are members of the tribe of Chickasaw Indians, and that they and each of them are of right entitled to have their names enrolled on the roll of citizenship to be prepared by this honorable commission ; for these petitioners say :

First. That on the 17th day of October, 1856, the legislature of the Chickasaw nation passed the following act :

" An act granting citizenship to heirs of Wm. H. Bourland.

" SEC. 1. Be it enacted by the legislature of the Chickasaw nation, That the right of citizenship is hereby granted to the following-named children and nephews of William H. Bourland, Nancy, Amanda, Matilda, Gordentia, and Run Hannah.

C. HARRIS, *Governor.*"

Approved Oct. 17, 1856.

And these petitioners say that by reason of said act of said legislature that Matilda Bourland became and was a member of the tribe of Chickasaw Indians, as much so as if she had been a native-born citizen of the Chickasaw nation.

Second. That on the 24th day of January, 1867, the said Matilda Bourland was duly and legally married to the petitioner A. B. Roff, and that they lived together as husband and wife up to the time of the death of the said Matilda, and that by reason of the said marriage to said A. B. Roff, under the laws, treaties, and constitution, as they existed and as they now exist, petitioner A. B. Roff became and ever since has been a member of the tribe of Chickasaw Indians as much so as if a native-born citizen of the Chickasaw nation, with all the rights, privileges, and immunities of a native-born Chickasaw.

Third. That petitioner Matilda Clary is the legitimate daughter of A. B. Roff and Matilda Roff, and that Leonard Clary and Emma Fay Clary, minors, are the legitimate children of G. E. Clary and Matilda Clary.

Fourth. Petitioner further states that after the death of the said Matilda Roff that the said A. B. Roff was again legally married on the 11th day of November, 1869, to Hen-

rietta Davenport, and that he continued to live with his said wife up to the time of her death, and that during the time they lived together as husband and wife there was born unto them four children and petitioners herein, to wit : Alice Roff, now Mrs. Alice Williams ; Leon Roff, Walter Roff, and Mabel Roff.

Fifth. Petitioners state that the said Matilda Roff, the daughter of A. B. Roff, a petitioner herein, by virtue of a marriage license issued by W. H. Duncan, county and probate judge of Pickens county, Chickasaw nation, was on the 12th day of February, 1890, duly and legally married to the petitioner G. E. Clary, and that by reason thereof the said G. E. Clary became and was and ever since has been a member of the tribe of Chickasaw Indians, and that since their marriage there was born unto them two children, namely, Leonard B. Clary and Emma Fay Clary, minors and petitioners herein.

Sixth. The petitioners further state that the said Alice Roff, the daughter of A. B. Roff and Henrietta Roff, on the — day of —, 1895, was duly and legally married to George Williams and that the said Williams by reason thereof became and was and ever since said date has been a member of the tribe of Chickasaw Indians, and that since their marriage there was born unto them a child, namely, Inez Williams, a petitioner herein.

Seventh. Petitioners further show that an act of the legislature of the Chickasaw nation passed October 17th, 1856, adopting said Matilda Bourland and others, as aforesaid, has been ratified and confirmed by a vote of the Chickasaw Indians, and that for a long time after the marriage of the said A. B. Roff and Matilda Bourland, and until a few years ago, said A. B. Roff was recognized and treated as a member of the tribe of Chickasaw Indians by said tribe of Indians.

In support of the foregoing statements the petitioners herewith file affidavits, record evidences, copies of law, &c., and further show by indorsement hereon that the principal chief or governor of the Chickasaw nation has been duly and legally served with a true copy of this application and with a true copy of the evidence herewith filed.

Wherefore, the premises considered, these petitioners pray

that their names be duly enrolled upon the roll of citizenship to be prepared by this honorable commission as members of the tribe of Chickasaw Indians, and will ever pray.

FURMAN & HERBERT,  
*Attorneys for Petitioners.*

The answer filed by the Chickasaw Nation does not attempt to controvert the facts alleged in this application (Record No. 459, pp. 5 to 11), but sets up as a defense, 1st, That the Chickasaw act of 1856 adopting the Bourland heirs (one of whom Roff married), was repealed by act of that nation passed in 1857; 2nd, That the Chickasaw constitution of 1855 only authorized the legislature, by legislative adoption, to confer upon the Bourland heirs the right to *reside* in the Chickasaw Nation, and that said act adopting them was unconstitutional. This answer is lengthy but a careful reading of same will show we correctly state the issues.

The master, upon the whole evidence, held that the act of 1856 adopting the Bourland heirs was not repealed by the *alleged* act of 1857; that Matilda Bourland was an adopted Chickasaw; that her marriage to A. B. Roff (with whom she resided in the nation up to the time of her death) under the treaty of 1866 and constitution of 1867 (cited *supra*) made Roff a member of the tribe with all the rights, privileges and immunities of a *native* or *blooded* Chickasaw; that his children by his first and second wives are members of the tribe, and that the husband of his daughter, Matilda Clary, having married according to tribal laws, is a member of the tribe; that the husband of his daughter, Alice Williams, is not a member, because his marriage did not conform to the tribal laws; that the children of his married daughters are members of the tribe (*Id.*, Rec., pp. 13 to 17). This man Roff *has resided in the Chickasaw nation* since his first marriage, January 24, 1867 (Rec., p. 3).

The court, upon the *evidence* and master's report, decreed that all applicants (ten in number) except George Williams are members of the tribe of Chickasaw Indians, and are entitled to be enrolled as such (Rec., p. 23).

We submit that if articles 38 and 26 of the treaty of United States with Choctaws and Chickasaws mean anything, it decides in favor of appellees in the Roff case the question of citizenship.

Even if the Chickasaw nation in 1857 had the right to repeal the act of 1856 and decitizenize the Bourland heirs, the evidence does not show such act was then repealed. As late as 1876 a committee of the Chickasaw nation, in codifying the laws of this tribe, reported to the legislature as a then existing statute the act of 1856 adopting the Bourland heirs (Rec., p. 14).

For years this man, Roff, was treated by this tribe as a member thereof in every sense. January 11, 1882, Judge B. W. Carter (Indian), judge of the District Court of the Chickasaw nation, passed upon his status as a citizen of said nation and held him to be a citizen thereof. (Rec., p. 41.) In 1888, the United States Indian agent at Muskogee, Ind. Ter., was applied to to remove him as an intruder, but application was denied. (Rec., pp. 41-2.) In 1880 he was accepted as bondsman in the tribal courts. (Rec., p. 43.) In 1889 he was summoned to serve as a juror in the Indian District Court of said nation (Rec., p. 44), and as late as March 19, 1896, the nation granted to him and other members of the tribe a mining charter. (Rec., p. 42.) A prominent Choctaw lawyer in 1897, in discussing the rights of an intermarried Choctaw, said to the United States Court that this class of people have but *one right under the treaties* and that is "a right to be whipped!" And it does appear to us that the Chickasaw nation is trying to apply that rule to Roff and insist upon it as the law. But as was shown



by the report of the Dawes Commission to Congress (quoted herein) this is a fair way to state the disposition of these tribes to fritter away the citizenship of its white members and thus confiscate their fortunes acquired as the result of thirty years hard work. No restrictive marriage laws existed in the Chickasaw Nation at the time Roff was married to Matilda Bourland, nor at the time he married the second time—hence, it must be held, his marriages were in conformity with article 38 of the treaty of 1866.

After the ratification of the treaty of 1866, the Choctaw nation in 1875 passed a marriage law (Opinions of Judge Clayton, p. 29) providing that every *white man*, or citizen of the United States, or of any foreign government, desiring to marry a *Choctaw woman*, citizen of the Choctaw nation," shall obtain a license as in said act provided by paying *one hundred dollars* for a marriage license. This statute does not require a female white person to procure or obtain such license to marry a male member of the Choctaw nation. So, even if this statute is valid (which we deny), article 38 of treaty of 1866 is complied with, and the requirements of such Indian statute are conformed to when a female citizen of the United States legally marries a male member of the Choctaw nation, no matter under what law such marriage is consummated.

The marriage law of the Chickasaw nation of October 19, 1876, is as follows :

"SECTION 1. Be it enacted by the legislature of the Chickasaw nation, That all non-citizens shall remain in any one county of this nation for a period of two years, and be of good moral character and industrious habits, before they can procure a license to marry a citizen of this nation; Provided, further, they be recommended by at least five good and responsible citizens of this nation, and of the county wherein they resided, the county judge being satisfied with the petition shall grant a license to marry under existing

laws, and the non-citizens so applying for license shall pay fifty dollars, five of which shall be retained by the county judge and forty-five dollars to be placed in the national treasury for national purposes.

"SEC. 2. Be it further enacted, That such member of the Chickasaw nation shall be competent to contract marriage, or shall have the consent of his or her parents or guardian to marry such citizen of the United States, and *hereafter no marriage between a citizen of the United States and a member of the Chickasaw nation shall confer any right of citizenship, or any right to improve or select lands within the Chickasaw nation, unless such marriage shall have been solemnized in accordance with the laws of the Chickasaw nation*: and all marriages between citizens of the United States and members of the Chickasaw nation shall be duly certified by the officer or minister of the gospel who shall have performed the marriage ceremony, to the clerk of the county court of the county where such marriage took place, who shall record the same, and every such officer or minister of of the gospel (if a citizen of the Chickasaw nation) who shall marry a citizen of the United States to a member of the Chickasaw nation without such license, shall be subject to a fine of fifty dollars, to be imposed by the county court and collected as other fines, for county purposes; and if such minister be a citizen of the United States, he shall be removed from the nation.

"SEC. 3. Be it further enacted, *That no marriage heretofore solemnized, or which may hereafter be solemnized, between a citizen of the United States and a member of the Chickasaw nation, shall enable such citizen of the United States to confer any right or privilege, whatever, in this nation, by again marrying a citizen of the United States, or upon such other citizen of the United States or their issue, and in case any citizen of the United States shall have married a member of the Chickasaw nation, and shall have heretofore abandoned her, or should hereafter voluntarily abandon or separate from such member of the Chickasaw nation, such citizen of the United States shall forfeit all right acquired by such marriage in this nation, and shall be liable to removal, as an intruder, from the limits thereof.*

"SEC. 4. Be it further enacted, That all acts or parts of

acts coming in conflict with the provisions of this act are hereby repealed, and that this act take effect from and after its passage."

This marriage law should not be sustained, because it is in conflict with the treaty. It is not uniform in its application. It discriminates against the white member of the tribe in favor of the blooded member. Article 38 of the treaty of 1866 places the white member on the same plane as the blooded Indian and gives to him all the rights, privileges, and immunities of an Indian by blood. This law treats the marriage of a *blooded Chickasaw to a white person* as a civil contract. It gives to him the right to divorce himself from his wife and to marry as many white women as he desires and can get, and thereby confer Chickasaw citizenship upon each of his said wives and the issue of all of said marriages. The white member of the tribe, if his Indian wife dies, or if he abandons her for adultery, forsooth, cannot treat the marriage relation as a civil contract; but if he would not become an *intruder—an exile*—if he desires to marry again he *must confine his marriage contracts* to the dusky maiden, wherein one drop of Indian blood "the surging sea outweighs!"

Will it be assumed that this great Government must look to these tribes of Indians to determine what is meant by the marriage relation? Is the language employed in article 38 of the treaty of 1866 ambiguous and susceptible of more than one construction? Not so, although counsel for appellant in his oral argument attempted to show that the language "having married" does not mean "who is married," but means who had theretofore married into the tribe and, therefore, he insisted that marriages, subsequent to this treaty, conferred no right upon the white person, and that, too, in the face of article 26 of the same treaty which amounts to a flat contradiction of his theory.

Mr. Blackstone said :

" Our law considers marriage in no other light than as a *civil contract*. The *holiness* of the matrimonial state is left entirely to the *ecclesiastical law*. And such contract is good and valid if the parties, (1) were at the time of making it *willing to contract*, (2) *able to contract*, and (3) *actually did contract in the proper forms and solemnities required by law*."

1 Black, Com. 439.

Stewart's Marriage and Divorce, Ch. 11.

14 Am. and Eng. Ency. Law (old ed.), 470.

No better definition of a marriage can be given than is given by Mr. Blackstone. Suppose, in lieu of these laws, the tribes had said a "white person by marrying a member of the tribe shall not become a member of the tribe," or by saying "he shall not be entitled to an allotment of the lands," or that "he shall marry according to the rules of the common law—the statutory laws of Texas, Kansas, or Arkansas"—could such rule be sustained in the light of the treaty? Suppose we look to the treaty above to determine the status of the white man who has married a member of the tribe, would not a marriage contract consummated under the rules of common law, or under any statute, valid where consummated, be sustained as a valid marriage in this Territory? We submit, if the parties are competent to contract marriage, and they legally consummate such marriage contract under the forms of law, the marriage is valid the world over, even though the male spouse had not been previously recommended to his affianced in particular and the nation in general as to "good morals," financial standing, &c. Bad morals might be, and doubtless is, a ground for divorce; but do they inhibit the consummation of a marriage contract?

Not only does appellant contend that the white person must continuously marry a Chickasaw or Choctaw by blood

to perpetuate his nationality (as a member of the tribe), but that if he marries a white person even in accordance with the tribal laws he, *ipso facto*, decitizenizes himself. Judges Townsend and Clayton stretched the doctrine far enough to hold that the local marriage laws of these tribes must be complied with or citizenship by marriage could not be acquired, but held that a white person acquiring citizenship by marriage became a member of the tribe for all purposes and could confer such citizenship by again marrying in compliance with the tribal marriage laws. (Clayton, Opinions 38 and 41, and Townsend's Opinion, Roff Case No. 469, docket this Court, p. 18.)

#### **B. Citizens by Blood (Residents and Non-Residents).**

The right of the Chickasaw or Choctaw who resided in either nation of said tribes when he applied to the Dawes Commission for enrollment regardless of the *quantum* of Indian blood is not disputed, but as Judge Clayton held an absentee did, and Judge Townsend held he did not, expatriate himself by reason of his absence the right of the non-resident is presented to this Court for its decision. Article 14 of the treaty of 1830 between the Choctaws and the United States reads (7 Stat., p. 333):

"Article 14. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half of that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years

after the ratification of this treaty, in that case a grant in fee-simple shall issue; said reservation shall include the present improvements of the head of the family or a portion of it. *Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."*

After the treaty of 1855 (cited *supra*) between the Choctaws and Chickasaws and the United States, and under the terms of which the Chickasaws, by purchase, acquired an undivided one-fourth interest in and to the Choctaw nation, and the right to carve out and establish the *now* Chickasaw nation, the treaty of 1866 between these tribes and the United States was entered into (14 Stat., 774), article 13 of which provides for surveying, sectionizing, and mapping the lands of these tribes.

Article 12 reads:

"The maps of said surveys shall exhibit, as far as practicable, the outlines of the *actual occupancy* of members of the said nations, respectively; and when they are completed shall be returned to the said land office at Boggy Depot for inspection by *all parties interested, when notice for ninety days shall be given of such return in such manner as the legislative authorities of the said nations, respectively, shall prescribe, or, in the event of said authorities failing to give such notice in a reasonable time, in such manner as the register of said land office shall prescribe, calling upon all parties interested to examine said maps—to the end that errors, if any, in the location of such occupancies, may be corrected.*"

Article 13 of same treaty reads:

"Article 13. The notice required in the above article shall be given, *not only in the Choctaw and Chickasaw nations, but by publication in newspapers printed in the States of Mississippi and Tennessee, Louisiana, Texas, Arkansas and Alabama, to the end that such Choctaws and Chickasaws as yet remain out-*

*side of the Choctaw and Chickasaw nations may be informed and have opportunity to exercise the rights hereby given to resident Choctaws and Chickasaws. Provided, That before any such absent Choctaw or Chickasaw shall be permitted to select for him or herself, or others, as hereinafter provided, he or she shall satisfy the register of the land office of his or her intention, or the intention of the party for whom the selection is to be made, to become bona fide resident in the said nation within five years from the time of selection. And should the said absentee fail to remove into said nation and occupy and commence an improvement on the land selected within the time aforesaid, the said selection shall be cancelled, and the land shall thereafter be discharged from all claim on account thereof."*

On November 5, 1886, the Choctaw council passed an act (Clayton Opinions, pp. 22 and 23) as follows :

*"AN ACT entitled An act defining the quantity of blood necessary for citizenship."*

*"SEC. 1. Be it enacted by the General Council of the Choctaw nation assembled, That hereafter all persons, non-citizens of the Choctaw nation, making or presenting to the general council, petitions for rights of Choctaws in this nation, shall be required to have one-eighth Choctaw blood, and shall be required to prove the same by competent testimony.*

*"SEC. 2. Be it enacted, That all applicants for rights in this nation shall prove their mixture of blood to be white and Indian.*

*"SEC. 3. Be it further enacted, That no person convicted of any felony or high crime shall be admitted to the rights of citizenship within this nation.*

*"SEC. 4. Be it further enacted, That this act shall not be construed to affect persons within the limits of the Choctaw nation, now enjoying the rights of citizenship.*

*"SEC. 5. Be it further enacted, That this act shall take effect and be in force from and after its passage."*

On December 24, 1889, the general council of the Choctaw nation passed the following resolution :

"Whereas, there are large numbers of Choctaws yet in the States of Mississippi and Louisiana, who are entitled to all the rights and privileges of citizenship in the Choctaw nation ; and,

"Whereas, they are denied all rights of citizenship in said States ; and,

"Whereas, they are too poor to immigrate themselves into the Choctaw nation : Therefore,

"*Be it resolved by the general council of the Choctaw nation assembled*, That the United States Government is hereby requested to make provisions for the emigration of said Choctaws from said States to the Choctaw nation," etc.

(Clayton's Opinions, p. 14.)

In the light of the foregoing treaties and laws we respectfully but earnestly insist that Choctaw and Chickasaw citizenship is divided into three classes, viz :

- 1st. The citizen by blood, resident or non-resident, and that the *quantum* of blood is immaterial.
- 2d. Citizens who have legally married members of the tribe, and
- 3d. Citizens by legislative adoption ; and that, once a member of either of these tribes the citizen is always a member unless he decitizenizes himself pursuant to act of Congress.

*Elk vs. Wilkins*, 112 U. S., 94.

*Raymond vs. Raymond*, 28 C. C. A., 38.

The courts below gave much attention and time to the investigation of these cases, and their conclusions of fact, we submit, will not be inquired into by this honorable Court and that



all the cases herein referred to should either be dismissed for want of jurisdiction, or affirmed upon the lower court's findings of fact.

HENRY M. FURMAN,  
CALVIN L. HERBERT,  
WM. I. CRUCE,  
ANDREW C. CRUCE,  
JAMES C. THOMPSON,

*Counsel for Appellees Named.*

## Statement of the Case.

The statute conferring jurisdiction upon this court to consider and act upon this class of cases was intended to operate retrospectively, and is not thereby rendered void.

The validity of remedial legislation of this kind cannot be questioned unless it is in violation of some provision of the Constitution.

The appeals to this court granted by the act extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory, and the limitation applies to both classes of cases mentioned in the opinion of the court, viz.: (1) citizenship cases; (2) cases between either of the Five Civilized Tribes and the United States.

The distribution of jurisdiction made by the act of March 3, 1891, c. 517, is to be observed in these cases; but the whole case is not open to adjudication, but the appeal is restricted to the constitutionality and validity of the legislation.

This legislation is not in contravention of the Constitution; on the contrary, the court holds it all to be constitutional.

By the sixteenth section of the Indian Appropriation Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners "to enter into negotiations with the Cherokee Nation, Choctaw Nation, Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

The Commission was appointed and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895, c. 189, 28 Stat. 939, two additional members

## Statement of the Case.

were appointed. It is commonly styled the "Dawes Commission."

The Senate on March 29, 1894, adopted the following resolution:

*"Resolved*, That the Committee on the Five Civilized Tribes of Indians, or any sub-committee thereof appointed by its chairman, is hereby instructed to inquire into the present condition of the Five Civilized Tribes of Indians, and of the white citizens dwelling among them, and the legislation required and appropriate to meet the needs and welfare of such Indians; and for that purpose to visit Indian Territory, to take testimony, have power to send for persons and papers, to administer oaths, and examine witnesses under oaths; and shall report the result of such inquiry, with recommendations for legislation; the actual expenses of such inquiry to be paid on approval of the chairman out of the contingent fund of the Senate."

The Committee visited the Indian Territory accordingly, and made a report May 7, 1894. (Sen. Rep. No. 377, 53d Cong. 2d Sess.) In this report it was stated: "The Indian Territory contains an area of 19,785,781 acres, and is occupied by the five civilized tribes of Indians, consisting of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles. Each tribe occupies a separate and distinct part, except that the Choctaws and Chickasaws, though occupying separately, have a common ownership of that part known as the Choctaw and Chickasaw territory, with rights and interests as recognized in their treaties as follows: The Choctaws, three fourths, and the Chickasaws, one fourth. The character of their title, the area of each tribe, together with the population and an epitome of the legislation concerning these Indians during the last sixty-five years, is shown by the report of the Committee on Indian Affairs, submitted to the Senate on the 26th day of July, 1892," (Sen. Rep. No. 1079, 52d Cong. 1st Sess.) and so much of that report as touched on those points was set forth.

The Committee then gave the population from the census of 1890 as follows: Indians, 50,055; colored Indians, colored

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STEPHENS *v.* CHEROKEE NATION.

CHOCTAW NATION *v.* ROBINSON.

JOHNSON *v.* CREEK NATION.

CHICKASAW NATION *v.* ROBINSON.

APPEALS FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

Nos. 423, 453, 461, 496. Argued and submitted February 23, 24, 27, 1899. — Decided May 15, 1899.

Congress may provide for a review of the action of commissioners and boards created by it and exercising only *quasi* judicial powers, by a transfer of their proceedings and decisions to judicial tribunals for examination and determination *de novo*.

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claimants to Indian citizenship, freedmen and colored, wholly or in part, 18,636; Chinese, 13; whites, 109,393; whites and colored on military reservation, 804; population of Quapaw Agency, 1281; or a total of 180,182; and said: "Since the taking of the census of 1890, there has been a large accession to the population of whites who make no claim to Indian citizenship, and who are residing in the Indian Territory with the approval of the Indian authorities. It is difficult to say what the number of this class is, but it cannot be less than 250,000, and it is estimated by many well-informed men as much larger than that number and as high as 300,000." After describing the towns and settlements peopled by whites, and the character of the Indian Territory, its climate, soil and natural wealth, the report continued:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers and to follow professional pursuits.

"It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of

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exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever."

The Committee next referred to the class of white people denominated by the Indians as intruders, in respect of whom there had been but little complaint in other sections of the Indian Territory than that of the Cherokee Nation; and went on to say:

"The Indians of the Indian Territory maintain an Indian government, have legislative bodies and executive and judicial officers. All controversies between Indian citizens are disposed of in these local courts; controversies between white people and Indians cannot be settled in these courts, but must be taken into the court of the Territory established by the United States. This court was established in accordance with the provision of the treaties with the Choctaws, Chickasaws, Creeks and Seminoles, but no such provision seems to have been made in the treaty with the Cherokees. We think it must be admitted that there is just cause of complaint among the Indians as to the character of their own courts, and a good deal of dissatisfaction has been expressed as to the course of procedure and final determination of matters submitted to these courts. The determinations of these courts are final, and, so far, the Government of the United States has not directly interfered with their determinations. Perhaps we should except the recent case where the Secretary of the Interior thought it his duty to intervene to prevent the execution of a number of Choctaw citizens."

The report then recapitulated the legislation conferring certain jurisdiction over parts of the Indian Territory on the District Courts of the United States for the Western District of Arkansas, the Eastern District of Texas and the District of Kansas; the establishment of the United States court in the Indian Territory; the inclusion of a portion of

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the Indian Territory within the boundaries of the Territory of Oklahoma, and the creation of a new Indian Territory, over parts of which the jurisdiction of the District Courts of Arkansas and Texas remained; and, for reasons assigned, recommended the appointment of two additional judges for the United States court in the Indian Territory, and of additional commissioners, and that the jurisdiction of the District Courts should be withdrawn.

The matter of schools was considered; and finally the question of title to the lands in the Indian Territory; and the Committee stated:

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust.

"Is it possible because the Government has lodged the title in the tribe in trust that it is without power to compel the execution of the trust in accordance with the plain provisions of the treaty concerning such trust? Whatever power Congress possessed over the Indians as semi-dependent nations, or as persons within its jurisdiction, it still possesses; notwithstanding the several treaties may have stipulated that the Government would not exercise such power; and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes.

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"If the determination of the question whether the trust is or is not being properly executed is one for the courts and not for the legislative department of the Government, then Congress can provide by law how such questions shall be determined and how such trust shall be administered, if it is determined that it is not now being properly administered.

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. The situation grows worse and will continue to grow worse. There can be no modification of the system. It cannot be reformed. It must be abandoned and a better one substituted. That it will be difficult to do your Committee freely admit, but because it is a difficult task is no reason why Congress should not at the earliest possible moment address itself to this question."

On November 20, 1894, and November 18, 1895, the Dawes Commission made reports to Congress of the condition of affairs in the Indian Territory in respect of the manner in which the lands were held by the members of the tribes, and of the manner in which the citizenship of said tribes was dealt with, finding a deplorable state of affairs and the general prevalence of misrule.

In the report of November 18, 1895, the Commission, among other things, said: "It cannot be possible that in any portion of this country, government, no matter what its origin, can remain peaceably for any length of time in the hands of one fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the Territory



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this attempt of a fraction to dictate terms to the whole has already reached its limit, and, if left without interference, will break up in revolution."

And the Commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship, the manipulation of the rolls, and proceedings in Indian tribunals, stated: "The Commission is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

And further:

"The Commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will restore to the people the benefit of the tribal property, and that security and order in government enjoyed by the people of the United States, will be in vain.

"The Commission is therefore brought to the consideration of the question: What is the duty of the United States Government toward the people, Indian citizens and United States citizens, residing in this Territory under governments which it has itself erected within its own borders?

"No one conversant with the situation can doubt that it is impossible of continuance. It is of a nature that inevitably grows worse, and has in itself no power of regeneration. Its own history bears testimony to this truth. The condition is every day becoming more acute and serious. It has as little power as disposition for self-reform.

"Nothing has been made more clear to the Commission than that change, if it comes at all, must be wrought out by the authority of the United States. This people have been wisely given every opportunity and tendered every possible assistance to make this change for themselves, but they have persistently refused and insist upon being left to continue present conditions.

"There is no alternative left to the United States but to

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assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought about these results, and the continuance rests on its authority. Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. Insecurity of life and person and property increasing every day makes immediate action imperative.

"The pretence that the Government is debarred by treaty obligations from interference in the present condition of affairs in this Territory is without foundation. The present conditions are not 'treaty conditions.' There is not only no treaty obligation on the part of the United States to maintain, or even to permit, the present condition of affairs in the Indian Territory, but on the contrary the whole structure and tenor of the treaties forbid it. If our Government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to blot out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to this people and against the wishes of all, people and governments alike. The cry, therefore, of those who have brought about this condition of affairs, to be let alone, not only finds no shelter in treaty obligations but is a plea for permission to further violate those provisions.

"The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

By the Indian Appropriation Act of June 10, 1896, c. 398, 29 Stat. 321, 339, the Commission was "directed to continue the exercise of the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them, and report from time to time to Congress;" and it was further provided as follows:

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"That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act.

"The said Commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: *And provided, further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided,* That if the

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tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

By the act of March 1, 1889, c. 333, entitled "An act to establish a United States court in the Indian Territory, and for other purposes," 25 Stat. 783, a United States court was established, with a single judge, whose jurisdiction extended over the Indian Territory, and it was provided that two terms of said court should be held each year at Muscogee in said Territory on the first Mondays of April and September, and such special sessions as might be necessary for the despatch of business in said court at such times as the judge might deem expedient.

On May 2, 1890, an act was passed, c. 182, "to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," 26 Stat. 81, 93, which enacted "that for the purpose of holding terms of said court, said Indian Territory is hereby divided into three divisions to be known as the first, second and third divisions;" the divisions were defined; the places in each division where court should be held were enumerated; and it was provided that

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the "judge of said court shall hold at least two terms of said court in each year in each of the divisions aforesaid, at such regular times as such judge shall fix and determine."

March 1, 1895, an act was approved, c. 145, entitled "An act to provide for the appointment of additional judges of the United States court in the Indian Territory." 28 Stat. 693. The first section of this act declared: "That the Territory known as the Indian Territory, now within the jurisdiction of the United States court in said Territory, is hereby divided into three judicial districts, to be known as the Northern, Central and Southern Districts, and at least two terms of the United States court in the Indian Territory shall be held each year at each place of holding court in each district at such regular times as the judge for each district shall fix and determine. The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency and the townsite of the Miami Townsite Company. . . . The Central District shall consist of all the Choctaw country. . . . The Southern District shall consist of all the Chickasaw country."

The act provided for two additional judges for the court, one of whom should be judge of the Northern District, and the other, judge of the Southern District, and that the judge then in office should be judge of the Central District. The judges were clothed with all the authority, both in term time and in vacation, as to all causes, both criminal and civil, that might be brought in said district, and the same superintending control over commissioners' courts therein, the same authority in the judicial districts to issue writs of *habeas corpus*, etc., as by law vested in the judge of the United States court in the Indian Territory or in the Circuit or District Courts of the United States. The judge of each district was authorized and empowered to hold court in any other district for the trial of any cause which the judge of such other district was disqualified from trying, and whenever on account of sickness or for any other reason the judge of any district was unable to perform the duties of his office, it was provided that either of the

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other judges might act in his stead in term time or vacation. All laws theretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory as defined by law as to offences committed within the Territory, were repealed and their jurisdiction conferred after September 1, 1896, on the "United States courts in the Indian Territory."

By section eleven of this act it was provided:

"SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said Supreme Court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory; and appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

"Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States. Said

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appellate court shall appoint its own clerk, who shall hold his office at the pleasure of said court, and who shall receive a salary of one thousand two hundred dollars per annum. The marshal of the district wherein such appellate court shall be held shall be marshal of such court. Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year, at such times and for such periods as may be fixed by the court."

By the Indian Appropriation Act of June 7, 1897, c. 3, 30 Stat. 84, provision was made for the appointment of an additional judge for the United States court in the Indian Territory, who was to hold court at such places in the several judicial districts therein, and at such times, as the appellate court of the Territory might designate. This judge was to be a member of the appellate court and have all the authority, exercise all the powers, and perform the like duties as the other judges of the court, and it was "*Provided*, that no one of said judges shall sit in the hearing of any case in said appellate court which was decided by him."

By this act of June 7, 1897, it was also provided:

"That the Commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities: *Provided further*, That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, and all criminal causes for the punishment of any offence committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective



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of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts.

"That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also*, That any one whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances and resolutions of the council of either of the aforesaid Five Tribes passed shall be certi-



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fied immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, until thirty days after their passage: *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

From the annual report of the Commission of October 3, 1897, it appears that there had been presented, in accordance with the provisions of the act of 1896, "some seven thousand five hundred claims, representing nearly, if not quite, seventy-five thousand individuals, each claim requiring a separate adjudication upon the evidence upon which it rested;" and that "about one thousand appeals have been taken from the decisions of the Commission." And the Commission said: "The condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their people, has been fully set forth in former reports of the Commission as well as in the reports of Congressional committees commissioned to make inquiry on the ground. It would be but repetition to attempt again a recital. Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the Government which created them."

June 28, 1898, an act was approved, c. 517, entitled "An act for the protection of the people of the Indian Territory, and for other purposes." 30 Stat. 495. The second section read:

"SEC. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief

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or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

And the third and eleventh sections in part:

"SEC. 3. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the Commission to the Five Tribes, or the United States court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

\* \* \* \* \*

"SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of same. . . . When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval: *Provided*, That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such act of

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Congress: *Provided further*, That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires: *Provided further*, That if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands."

Section 21 was as follows:

"That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.<sup>1</sup>

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<sup>1</sup> Article IX of the treaty of July 19, 1866, with the Cherokee Nation, (14 Stat. 799, 801,) is as follows: "The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that

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"Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

"Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

"The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth,

never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: *Provided*, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated."

Referring to that article, the Court of Claims, February 18, 1896, transmitted a communication to the Commissioner of Indian Affairs, stating: "The court is of the opinion that the clauses in that article in these words, 'and are now residents therein, or who may return within six months, and their descendants,' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and, consequently, that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen, and the descendants of freedmen, who did not return within six months, are excluded from the benefits of the treaty and of the decree. The court is also of the opinion that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867." 31 Ct. Cl. 148.

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eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

"It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

"It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

"The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and

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it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrolment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish any one who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

"The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offence."

"SEC. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

"SEC. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore

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authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight."

Section 29 ratified the agreement made by the Commission with commissions representing the Choctaw and Chickasaw tribes, April 23, 1897, as amended by the act, and provided for its going into effect if ratified before December 1, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose, "*Provided*, that no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election;" "and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement."

Then followed the agreement referred to, containing provisions as to allotments, railroads, town sites, mines, jurisdiction of courts and tribal legislation, and stating: "It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State in the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes." The agreement was



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ratified by the two nations in August, 1898. Rep. Com. Ind. Affairs, 1898, p. 77.

Section thirty made similar provision in respect of an agreement with the Creek Nation, which is set forth.

The Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 591, continued the authority theretofore conferred on the Commission by law, and contained this provision:

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

Thereupon numerous appeals were prosecuted to this court, of which one hundred and sixty-six were submitted on printed briefs, with oral argument in many of them. Four of these appeals are set out in the title, numbered 423, 453, 461, 496, and the remaining one hundred and sixty-two are enumerated in the margin.<sup>1</sup>

<sup>1</sup> No. 436, Cobb et al. v. Cherokee Nation; No. 438, Coldwell et al. v. Choctaw Nation; No. 445, Castoe et al. v. Cherokee Nation; No. 446, Anderson et al. v. Cherokee Nation; No. 447, Clark et al. v. Choctaw Nation; No. 449, Choctaw Nation v. Mickle et al.; No. 450, Same v. Skaggs; No. 451, Same v. Godard et al.; No. 452, Same v. Grady; No. 454, Morgan et al. v. Creek Nation; No. 456, Bridges et al. v. Creek Nation; No. 457, Cherokee Nation v. Parker et al.; No. 458, Same v. Gilliam et al.; No. 459, Bell et al. v. Cherokee Nation; No. 460, Truitt et al. v. Cherokee Nation; No. 464, Jor-



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The proceedings in these four appeals are sufficiently stated as follows:

No. 423.—STEPHENS ET AL. *v.* THE CHEROKEE NATION.

William Stephens; Mattie J. Ayres, his daughter; Stéphen G. Ayres, Jacob S. Ayres and Mattie Ayres, his grandchild-

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dan et al. *v.* Cherokee Nation; No. 465, Ward et al. *v.* Cherokee Nation; No. 466, Wasson et al. *v.* Muskogee or Creek Nation; No. 469, Chickasaw Nation *v.* Roff et al.; No. 470, Same *v.* Troop; No. 471, Same *v.* Love; No. 472, Same *v.* Hill et al.; No. 473, Same *v.* Thompson et al.; No. 474, Same *v.* Love; No. 475, Same *v.* Poe et al.; No. 476, Same *v.* McDuffie et al.; No. 477, Same *v.* McKinney et al.; No. 478, Same *v.* Bounds et al.; No. 479, Same *v.* King et al.; No. 480, Same *v.* Washington et al.; No. 481, Same *v.* Fitzhugh et al.; No. 482, Same *v.* Jones et al.; No. 483, Same *v.* Sparks et al.; No. 484, Same *v.* Hill et al.; No. 485, Same *v.* Arnold et al.; No. 486, Same *v.* Brown et al.; No. 487, Same *v.* Joines et al.; No. 488, Same *v.* Halford et al.; No. 489, Same *v.* Poyner et al.; No. 490, Same *v.* Albright et al.; No. 491, Same *v.* Doak et al.; No. 492, Same *v.* Passmore; No. 493, Same *v.* Laflin et al.; No. 494, Same *v.* Law et al.; No. 495, Same *v.* Saey; No. 497, Same *v.* Woody et al.; No. 498, Same *v.* Cornish et al.; No. 499, Same *v.* McSwain; No. 500, Same *v.* Standifer; No. 501, Same *v.* Bradley et al.; No. 502, Same *v.* Alexander et al.; No. 503, Same *v.* Sparks et al.; No. 504, Same *v.* Story et al.; No. 505, Same *v.* Archard et al.; No. 506, Same *v.* Keys; No. 507, Same *v.* McCoy; No. 508, Same *v.* Vaughan et al.; No. 509, Same *v.* Dorchester et al.; No. 510, Same *v.* Duncan; No. 511, Same *v.* Phillips et al.; No. 512, Same *v.* Lancaster; No. 513, Same *v.* Goldsby et al.; No. 514, Same *v.* East et al.; No. 515, Same *v.* Bradshaw et al.; No. 516, Same *v.* Graham et al.; No. 517, Same *v.* Burch et al.; No. 518, Same *v.* Palmer et al.; No. 519, Same *v.* Watkins et al.; No. 520, Same *v.* Holder et al.; No. 521, Same *v.* Jones et al.; No. 522, Same *v.* Worthy et al.; No. 523, Same *v.* Sartin et al.; No. 524, Same *v.* Woolsey et al.; No. 525, Same *v.* Arnold et al.; No. 526, Same *v.* Paul et al.; No. 527, Same *v.* Peery et al.; No. 528, Same *v.* Stinnet; No. 529, Same *v.* Stinnett et al.; No. 530, Same *v.* Duncan; No. 531, Same *v.* Lea et al.; No. 532, Same *v.* Hamilton; No. 533, Same *v.* Pitman; No. 534, Same *v.* Carson et al.; No. 535, Same *v.* Shanks et al.; No. 536, Same *v.* Paul; No. 537, Clark et al. *v.* Creek or Muskogee Nation; No. 538, Tulk et al. *v.* Same; No. 539, Hubbard et al. *v.* Cherokee Nation; No. 540, McAnnally et al. *v.* Same; No. 541, Brashear et al. *v.* Same; No. 542, Condry et al. *v.* Same; No. 543, Dial et al. *v.* Same; No. 544, Munson et al. *v.* Same; No. 545, Hubbard et al. *v.* Same; No. 546, Trotter et al. *v.* Same; No. 547, Hill et al. *v.* Same; No. 548, Russell et al. *v.* Same; No. 549, Baird et al. *v.* Same; No. 550, Binns et al. *v.* Same; No. 551, Smith et al. *v.* Same; No. 552, Henley et al. *v.* Same; No. 553, Same *v.* Same; No. 554, McKee et al. *v.* Same; No. 555, Singleton et al. *v.* Same; No. 556, Brown et al. *v.* Same; No. 557,

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dren, applied to the Dawes Commission for admission to citizenship in the Cherokee Nation, August 9, 1896; the nation answered denying the jurisdiction of the Commission, and on the merits; and the application was rejected, whereupon applicants appealed to the United States court in the Indian Territory, Northern District, where the cause was referred to a special master, who reported on the evidence that the applicants were Cherokee Indians by blood. The court, Springer, J., accepted the findings of the master that William Stephens was one fourth Indian and three fourths white; that he was born in the State of Ohio; that his father was a white man and a citizen of the United States; that his mother's name was Sarah and that she was a daughter of William Ellington Shoe-Boots, and that her father was known as Captain Shoe-Boots in the old Cherokee Nation; that his mother was born in the State of Kentucky, and that she moved afterwards to the State of Ohio, where she was married to Robert Stephens,

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Flippin et al. v. Same; No. 558, Gambill et al. v. Same; No. 559, Brewer et al. v. Same; No. 560, Abercrombie et al. v. Same; No. 561, Watts et al. v. Same; No. 562, Hackett et al. v. Same; No. 563, Pace et al. v. Same; No. 564, Teague et al. v. Same; No. 565, Earp et al. v. Same; No. 566, Mayberry et al. v. Same; No. 567, Bailes v. Same; No. 568, Lloyd v. Same; No. 569, Rutherford et al. v. Same; No. 570, Braught et al. v. Same; No. 571, Black et al. v. Same; No. 572, Archer et al. v. Same; No. 573, Hopper et al. v. Same; No. 574, Bayes et al. v. Same; No. 575, Rowell et al. v. Same; No. 576, Armstrong et al. v. Same; No. 577, Goin et al. v. Same; No. 578, Ben-night et al. v. Choctaw Nation; No. 579, Wade et al. v. Cherokee Nation; No. 582, Choctaw Nation v. Jones et al.; No. 583, Same v. Goodall et al.; No. 584, Same v. Bottoms et al.; No. 585, Same v. Brooks et al.; No. 586, Same v. Blake et al.; No. 587, Same v. Randolph et al.; No. 588, Same v. Goins et al.; No. 589, Same v. Dutton et al.; No. 590, Same v. Thomas; No. 591, Same v. Jones et al.; No. 592, Meredith et al. v. Cherokee Nation; No. 593, Poindexter et al. v. Same; No. 598, Steen et al. v. Same; No. 599, Couch et al. v. Same; No. 600, Pressley et al. v. Same; No. 601, Elliott et al. v. Same; No. 608, Walker et al. v. Same; No. 609, Harrison et al. v. Same; No. 612, Watts et al. v. Same; No. 613, Hazlewood et al. v. Same; No. 614, Frakes et al. v. Same; No. 615, Harper et al. v. Same; No. 616, Armstrong et al. v. Same; No. 617, Rogers et al. v. Same; No. 618, Isbell et al. v. Same; No. 619, Wiltenberger et al. v. Same; No. 637, Baker v. Creek Nation; No. 643, Cale v. Choctaw Nation; No. 644, Cundiff et al. v. Same; No. 645, Slayton et al. v. Same; No. 646, Willis et al. v. Same; No. 647, Coppedge v. Same; No. 648, Nabors et al. v. Same; No. 651, Phillips et al. v. Same.

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the father of William; that William Stephens came to the Cherokee Nation, Indian Territory, in 1873, and has resided in the Cherokee Nation ever since; that soon after he came to the Cherokee Nation he made application for his mother and himself to be readmitted as citizens of that nation; that the Commission who heard the case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application on a technical ground; that the chief, in a message to the council, stated that he was convinced of the honesty and genuineness of the claim, and wished the council to pass an act recognizing Stephens as a full citizen; but this was never done. The court, referring to the master's report, said:

"It is further stated that he has improved considerable property in the nation, and has continuously lived there as a Cherokee citizen, and at one time was permitted to vote in a Cherokee election. It appears from the evidence in the case that this applicant comes within the following provision of the Cherokee constitution: 'Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on memorializing the national council for such readmission.' There was a provision precisely similar to this in the constitution of the old Cherokee Nation as it existed prior to the removal of the tribe west of the Mississippi River. The provision just quoted is from the constitution of the Cherokee Nation as now constituted.

"The mother of the principal claimant, as heretofore stated, was born in the State of Kentucky, and from that State she moved to the State of Ohio, where she married the father of the principal claimant in this case. Her status was then fixed as that of one who had taken up a residence in the States. She had ceased to be a citizen of the Cherokee Nation, and she cannot be readmitted to citizenship in the nation except by

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complying with the constitution and laws of the nation as declared by the Supreme Court in the case of *The Eastern Band of Cherokee Indians against The Cherokee Nation and The United States*.

"The master states the claimant was rejected by the commission of the Cherokee Nation upon a technical ground. The ground upon which the decision was based was that the names of the claimants did not appear upon any of the authenticated rolls of the present Cherokee Nation or of the old Cherokee Nation. The commission which passed upon his application was created under the act of the council of December 8, 1886.

"Robert Stephens, the father of the principal claimant in this case, was a citizen of the United States and a resident of the State of Ohio, and the mother of the claimant William Stephens had abandoned the Cherokee Nation and ceased to be a citizen thereof. Therefore the principal claimant at the time of his birth was a citizen of the United States, taking the status of his father. I doubt whether he could become a citizen of the Cherokee Nation without the affirmative action of the Cherokee council. The evidence fails to disclose that he has ever applied to any of the commissions that had jurisdiction to admit him as a citizen of the Cherokee Nation. The commission to which he did apply for enrolment as a citizen of the Cherokee Nation having held that his name did not appear upon any of the Cherokee rolls of citizenship, his application was rejected. He never having been admitted to citizenship as required by the constitution and laws of the Cherokee Nation, the judgment of the United States commission rejecting this case is affirmed, and the application of the claimants to be enrolled as citizens of the Cherokee Nation is denied."

Judgment affirming the decision of the Dawes Commission refusing applicants' enrolment and admission as citizens of the Cherokee Nation was entered December 16, 1897, whereupon a motion for rehearing was filed, which was finally overruled June 23, 1898, and judgment again entered that applicants "be not admitted and enrolled as citizens of the Cherokee Nation, Indian Territory." From these decrees applicants prayed

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an appeal to this court August 29, 1898, which was allowed and perfected September 2, 1898, and the record filed here October 3, 1898.

No. 453. — THE CHOCTAW NATION *v.* F. R. ROBINSON.

September 7, 1896, F. R. Robinson applied to the Dawes Commission to be enrolled as an intermarried citizen. His petition set forth that he was a white man; that he married a woman of Choctaw and Chickasaw blood, September 21, 1873, by which marriage he had five children; that she died, and he married a white woman August 10, 1884, with whom he was still living. The Choctaw Nation answered, objecting that the Dawes Commission had no jurisdiction because the act of Congress creating it was unconstitutional and void; that Robinson had not applied for citizenship to the tribunal of the Choctaw Nation constituted to try questions of citizenship; and that he ought not to be enrolled "because he has not shown by his evidence that he has not forfeited his rights as such citizen by abandonment or remarriage." The Dawes Commission granted the application, and thereupon the Choctaw Nation appealed to the United States court in the Indian Territory, Central District. The cause was referred to a master, who made a report, and thereafter, June 29, 1897, the court, Clayton, J., found that Robinson was "a member and citizen of the Choctaw Nation by intermarriage, having heretofore been legally and in compliance with the laws of the Choctaw Nation married to a Choctaw woman by blood, and that said F. R. Robinson was by the duly constituted authorities of the Choctaw Nation placed upon the last roll of the members and citizens of the Choctaw Nation prepared by the said Choctaw authorities, and that his name is now upon the last completed rolls of the members and citizens of the said Choctaw Nation," and thereupon decreed that Robinson was "a member and citizen, by intermarriage with the Choctaw Nation, and entitled to all the rights, privileges, immunities and benefits in said nation as such intermarried citizen and said member;" and directed a certified copy of the judgment to be transmitted to the Commission. From this decree the

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Choctaw Nation prayed an appeal September 21, 1898, which was on that day allowed and perfected.

## No. 461. — JENNIE JOHNSON ET AL. v. THE CREEK NATION.

This was a petition of Jennie Johnson and others to the Dawes Commission for admission to citizenship and membership in the Creek Nation. It seems to have been presented August 10, 1896, on behalf of one hundred and nineteen applicants, to have been granted as to sixty-two, and to have been denied as to fifty-seven, by whom an appeal was taken to the United States court in the Indian Territory, Northern District. The cause was referred to a special master, and on June 16, 1898, the court, Springer, J., rendered an opinion, in which, after considering various laws of the Muskogee or Creek Nation bearing on the subject, certain decisions of tribal courts, the action of a certain "committee of eighteen on census rolls of 1895," and of the council thereon adopting the report of that committee, in respect of applicants, the court concluded that appellants were not entitled to be enrolled as citizens of the Creek Nation, and entered judgment accordingly, whereupon an appeal was prayed from said decree and allowed and perfected September 27, 1898.

## No. 496. — THE CHICKASAW NATION v. RICHARD C. WIGGS ET AL.

Richard C. Wiggs filed an application before the Dawes Commission to be admitted to citizenship in the Chickasaw Nation, asserting, among other things, that he was a white man and prior to October 13, 1875, a citizen of the United States, on which day he lawfully married Georgia M. Allen, a native Chickasaw Indian and member of the Chickasaw tribe; and also an application on behalf of his wife, Josie Wiggs, at the time of their marriage, which was in accordance with the Chickasaw laws under such circumstances, a white woman and citizen of the United States, and their daughter Edna Wiggs, August 15, 1896. The Chickasaw Nation, September 1, 1896, filed with the Commission its answer to these applications, which, after denying the jurisdiction of the Commission, traversed the allegations of the applications.

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November 15, 1896, the Dawes Commission admitted Richard C. Wiggs to citizenship in the Chickasaw Nation, but denied the application as to Mrs. Wiggs and their daughter. Thereafter an appeal was taken on behalf of the wife and daughter to the United States court in the Indian Territory, Southern District, and a cross appeal by the Chickasaw Nation from the decision of the Commission admitting Wiggs to citizenship. The court referred the cause to a master in chancery, who made a report in favor of Wiggs, but against his wife and daughter. The court, Townsend, J., found "that all of the applicants are entitled to be enrolled as Chickasaw Indians, it appearing to the court that the said Richard C. Wiggs, being a white man and citizen of the United States, was married in the year 1875 to Georgia M. Allen, who was a native Chickasaw Indian by blood. Said marriage was solemnized according to the laws of the Chickasaw Nation; that in the year 1876 the said wife of the said Richard C. Wiggs died; that from and after said marriage the said Richard C. Wiggs continued to reside in the Chickasaw Nation and to claim the rights of citizenship in said nation, and as such he served in the Chickasaw legislature, and was also sheriff of Pickens County, in said nation; that in the year 1886 the said Richard C. Wiggs was lawfully married, according to the laws of the Chickasaw Nation, to Miss Josie Lawson, and that ever since said marriage the said Wiggs and his present wife have resided in the Chickasaw Nation and claimed the rights of citizenship therein, and that there has been born unto them a daughter, Mary Edna Wiggs;" and thereupon entered a decree, December 22, 1897, admitting Richard C. Wiggs, his wife and their daughter, "to citizenship in the Chickasaw Nation and to enrolment as members of the tribe of Chickasaw Indians, with all the rights and privileges appertaining to such relation; and it is further ordered that this decree be certified to the Dawes Commission for their observance."

From this decree an appeal was allowed and perfected July 11, 1898.



## Counsel for Parties.

*Cherokee Nation cases. (Some argued, some submitted.)*

*Mr. S. M. Porter* for appellants argued Nos. 445, 446 February 24. *Mr. Heber J. May* for appellants argued other Cherokee cases February 27. *Mr. A. H. Garland, Mr. R. C. Garland* and *Mr. M. M. Edmiston* were on *Mr. May's* brief.

*Mr. William T. Hutchins* and *Mr. Wilkinson Call* argued for the Cherokee Nation February 27.

*Mr. Joseph M. Hill* and *Mr. James Brizzolara* filed a brief for appellants in No. 436.

*Mr. William M. Cravens* filed a brief for appellants in No. 459.

*Chickasaw Nation cases. (All submitted.)*

*Mr. Halbert E. Paine* and *Mr. Holmes Conrad* for appellants, submitted February 23. *Mr. Joseph G. Ralls* also for appellants.

*Mr. C. C. Potter* submitted for appellees February 23. The following submissions were made subsequently. *Mr. Silas Hare* and *Mr. Charles A. Keigwin* for appellants in No. 527. *Mr. Thomas Norman* and *Mr. William I. Cruce* for appellees in No. 472. *Mr. C. C. Potter* for appellee in Nos. 473 and 477. *Mr. Robert H. West* and *Mr. James L. Norris* for appellee in No. 474. *Mr. Henry M. Furman, Mr. Calvin L. Herbert, Mr. William I. Cruce, Mr. Andrew C. Cruce* and *Mr. James C. Thompson* for appellees in Nos. 469 and others. *Mr. J. W. Johnson* and *Mr. Dorset Carter* for appellees in No. 513. *Mr. W. A. Ledbetter* and *Mr. S. T. Bledroe* for appellees in No. 520.

*Choctaw Nation cases. (Some argued, some submitted.)*

*Mr. J. M. Wilson* for the Nation argued March 6, 7. *Mr. C. L. Herbert* for appellees in Nos. 586, 588 and 589, argued March 7. *Mr. Yancey Lewis, Mr. W. W. Dudley* and *Mr. L. T. Michener* for claimants in No. 438; *Mr. Yancey Lewis* for claimants in Nos. 447, 452, and 454; *Mr. William Ritchie*



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for claimants in No. 453; *Mr. M. M. Lindly, Mr. Jacob C. Hodges, Mr. P. D. Brewer and Mr. J. A. Hale* for claimants in No. 578; *Mr. Yancey Lewis and Mr. J. G. Ralls* for claimants in No. 644; *Mr. Walter A. Logan and Mr. William T. Hutchins* for claimants in No. 648; and *Mr. W. W. Dudley, Mr. L. T. Michener and Mr. Eugene Easton* for claimants in No. 450; and *Mr. Joseph G. Ralls* for appellants in Nos. 648, 647, 646, 645, 643 and 651 submitted on their respective briefs.

*Creek or Muskogee Nation cases. (All submitted March 7.)*

*Mr. William M. Cravens* for appellants in Nos. 454, 461.

*Mr. Benjamin T. Du Val* for the Muskogee Nation in Nos. 461 and 454.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

These appeals are from decrees of the United States court in the Indian Territory, sitting in first instance, rendered in cases pending therein involving the right of various individuals to citizenship in some one of the four tribes named; most of them came to that court by appeal from the action of the so-called Dawes Commission, though some were from decisions of tribal authorities; many questions are common to them all; and it will be assumed that in all of them the decrees were rendered and the court had finally adjourned before the passage of the act of July 1, 1898, providing for appeals to this court.

The act of June 10, 1896, provided "that if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however,* That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It must be admitted that the words "United States District Court" were not accurately used, as the United States Court in the Indian Territory was not a District or Circuit Court of

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the United States, *In re Mills*, 135 U. S. 263, 268, and no such court had, at the date of the act, jurisdiction therein. But as, manifestly, the appeal was to be taken to a United States court having jurisdiction in the Indian Territory, and in view of the other terms of the act bearing on the immediate subject-matter, to say nothing of subsequent legislation, it is clear that the United States court in the Indian Territory was the court referred to. This conclusion, however, may fairly be said to involve the rejection of the word "District" as a descriptive term, and reading the provision as granting an appeal to the United States court in the Indian Territory, the question arises whether the judgments made final by the statute are the judgments of that court in the several districts delineated by the act of March 1, 1895, or of the appellate court therein provided for, which may be referred to later on, since it is objected in the outset that no appeal from the decisions of the Dawes Commission or of the tribal authorities could be granted to any United States court; and, furthermore, that, at all events, it was not competent for Congress to provide for an appeal from the decrees of the United States court in the Indian Territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute.

As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated appeals for want of a better term, to judicial tribunals for examination and determination *de novo*; and, as will be presently seen, could certainly do so in respect of the action of tribal authorities.

The other objection, though appearing at first blush to be more serious, is also untenable.

The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate

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retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void.

And while it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. *Calder v. Bull*, 3 Dallas, 386; *Sampeyreac v. United States*, 7 Pet. 222; *Freeborn v. Smith*, 2 Wall. 160; *Garrison v. New York*, 21 Wall. 196; *Freeland v. Williams*, 131 U. S. 405; *Essex Public Road Board v. Skinkle*, 140 U. S. 334.

The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of reëxamination by a higher court though subsequently authorized by general law to exercise jurisdiction.

This brings us to consider the nature and extent of the

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appeal provided for. We repeat the language of the act of July 1, 1898, as follows:

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

This provision is not altogether clear, and we therefore inquire what is its true construction? Was it the intention of Congress to impose on this court the duty of reëxamining the facts in the instance of all applicants for citizenship, who might appeal; of construing and applying the treaties with, and the constitutions and laws, the usages and customs, of the respective tribes; of reviewing their action through their legislative bodies, and the decisions of their tribal courts, and commissions; and of finally adjudicating the right of each applicant under the pressure of the advancement of each case on the docket to be disposed of as soon as possible? Or, on the other hand, was it the intention of Congress to submit to this court only the question of the constitutionality or validity of the legislation in respect of the subject-matter? We have no hesitation in saying that in our opinion the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory.

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Two classes of cases are mentioned: (1) Citizenship cases. The parties to these cases are the particular Indian tribe and the applicant for citizenship. (2) Cases between either of the Five Civilized Tribes and the United States. Does the limitation of the inquiry to the constitutionality and validity of the legislation apply to both classes? We think it does.

It should be remembered that the appeal to the United States court for the Indian Territory under the act of 1896 was in respect of decisions as to citizenship only, and that in those cases the jurisdiction of the Dawes Commission and of the court was attacked on the ground of the unconstitutionality of the legislation. The determination of that question was necessarily in the mind of Congress in providing for the appeal to this court, and it cannot reasonably be supposed that it was intended that the question should be reopened in cases between the United States and the tribes. And yet this would be the result of the use of the words "affecting citizenship" in the qualification, if that qualification were confined to the last-named cases. The words cannot be construed as redundant and rejected as surplusage, for they can be given full effect, and it cannot be assumed that they tend to defeat, but rather that they are in effectuation of, the real object of the enactment. It is true that the provision is somewhat obscure, although if the comma after the words "all citizenship cases" were omitted, or if a comma were inserted after the words "the United States," that obscurity would practically disappear, and the rule is well settled that, for the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. *Hammock v. Loan and Trust Company*, 105 U. S. 77, 84; *United States v. Lacher*, 134 U. S. 624, 628; *United States v. Oregon & California Railroad*, 164 U. S. 526, 541.

On any possible construction, in cases between the United States and an Indian tribe, no appeal is allowed, unless the constitutionality or validity of the legislation is involved; and it would be most unreasonable to attribute to Congress an intention that the right of appeal should be more extensive in

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cases between an Indian tribe and an individual applicant for citizenship therein.

Reference to prior legislation as to appeal to this court from the United States court in the Indian Territory confirms the view we entertain.

By section five of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, as amended, appeals or writs of error might be taken from the District and Circuit Courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

By section six, the Circuit Courts of Appeals established by the act were invested with appellate jurisdiction in all other cases.

The thirteenth section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act."

The act of March 1, 1895, provided for the appointment of additional judges of the United States court in the Indian Territory and created a Court of Appeals with such superintending control over the courts in the Indian Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof; and the act also provided that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States," which thus in terms deprived that court of jurisdiction of appeals from the Indian Territory trial court under section 13 of the act of 1891. Prior to the act of 1895, the United States court in the Indian

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Territory had no jurisdiction over capital cases, but by that act its jurisdiction was extended to embrace them. And we held in *Brown v. United States*, 171 U. S. 631, that this court had no jurisdiction over capital cases in that court, the appellate jurisdiction in such cases being vested in the appellate court in the Indian Territory. Whether the effect of the act of 1895 was to render the thirteenth section of the act of 1891 wholly inapplicable need not be considered, as the judgments of the United States court in the Indian Territory in these citizenship cases were made final in that court by the act of 1896, and this would cut off an appeal to this court, if any then existed, whether the finality spoken of applied to the judgments of the trial court or of the appellate court. And when by the act of July 1, 1898, it was provided that "appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, . . . under the rules and regulations governing appeals to said court in other cases," the legislation taken together, justifies the conclusion that the distribution of jurisdiction made by the act of March 3, 1891, was intended to be observed, namely, that cases falling within the classes prescribed in section five should be brought directly to this court, and all other cases to the appellate court, whose decision, as the legislation stands, would in cases of the kind under consideration be final. We do not think, however, that the analogy goes so far, in view of the terms of the act of 1898, that in cases brought here the whole case would be open to adjudication. The matter to be considered on the appeal, like the appeal itself, was evidently intended to be restricted to the constitutionality and validity of the legislation. The only ground on which this court held itself to be authorized to consider the whole merits of the case upon an appeal from the Circuit Court of the United States in a case in which the constitutionality of a law of the United States was involved, under section 5 of the act of March 3, 1891, c. 517, was because of the express limitation in another part of that section of appeals upon the question of jurisdiction; and there is no kindred limitation in the act now before us. *Horner v. United States*, 143 U. S. 570, 577. The judgments of the



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court in the Indian Territory were made final, and appeals to this court were confined, in our opinion, to the question of constitutionality or validity only.

Was the legislation of 1896 and 1897, so far as it authorized the Dawes Commission to determine citizenship in these tribes, constitutional? If so, the courts below had jurisdiction on appeal.

It is true that the Indian tribes were for many years allowed by the United States to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States; and numerous treaties were made by the United States with those tribes as distinct political societies. The policy of the Government, however, in dealing with the Indian Nations was definitively expressed in a proviso inserted in the Indian Appropriation Act of March 3, 1871, c. 120, 16 Stat. 544, 566, to the effect:

"That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe," which was carried forward into section 2079 of the Revised Statutes, which reads:

"SEC. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is "well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the



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Government." *Thomas v. Gay*, 169 U. S. 264, 271, and cases cited.

As to the general power of Congress we need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in *Cherokee Nation v. Southern Kansas Railway Company*, 135 U. S. 641, 653, from whose opinion we quote as follows:

"The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the Government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' It is true, as declared in *Worcester v. Georgia*, 6 Pet. 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583,) that 'in the executive, legislative and judicial branches of our Government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State, or separate community.' But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to

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the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the Government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the Government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States v. Rogers*, 4 How. 567, 572, the court, referring to the locality in which a particular crime had been committed, said: 'It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. . . . We think it too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority.' In *United States v. Kagama*, 118 U. S. 375, 379, the court, after observing that the Indians were within the geographical limits of the United States, said: 'The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and

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thus far not brought under the laws of the Union or of the State within whose limits they resided. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' The latest utterance upon this general subject is in *Choctaw Nation v. United States*, 119 U. S. 1, 27, where the court, after stating that the United States is a sovereign nation limited only by its own Constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.'"

Such being the position occupied by these tribes, (and it has often been availed of to their advantage,) and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.

By the act of June 10, 1896, the Dawes Commission was authorized "to hear and determine the application of all persons who may apply to them for citizenship in said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled," but it was also provided:

"That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all

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treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

The act of June 7, 1897, declared that the Commission should "continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulation with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commis-

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sion will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also, That any one whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.*

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, until thirty days after their passage: *Provided, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes.*"

We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

The judgments in these cases were rendered before the pas-

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sage of the act of June 28, 1898, commonly known as the Curtis Act, and necessarily the effect of that act was not considered. As, however, the provision for an appeal to this court was made after the passage of the act, some observations upon it are required, and, indeed, the inference is not unreasonable that a principal object intended to be secured by an appeal was the testing of the constitutionality of this act, and that may have had controlling weight in inducing the granting of the right to such appeal.

The act is comprehensive and sweeping in its character, and notwithstanding the abstract of it in the statement prefixed to this opinion, we again call attention to its provisions. The act gave jurisdiction to the United States courts in the Indian Territory in their respective districts to try cases against those who claimed to hold lands and tenements as members of a tribe and whose membership was denied by the tribe, and authorized their removal from the same if the claim was disallowed; and provided for the allotment of lands by the Dawes Commission among the citizens of any one of the tribes as shown by the roll of citizenship when fully completed as provided by law, and according to a survey also fully completed; and "that if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands."

The act further directed, as to the Cherokees, that the Commission should "take the roll of Cherokee citizens of eighteen hundred and eighty, not including freedmen, as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood,

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have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have legal right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws." And that the Commission should make a roll of Cherokee freedmen, in compliance with a certain decree of the Court of Claims; and a roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty; and a roll of Chickasaw freedmen entitled to any rights or benefits under the treaty of 1866, and their descendants; and a roll of all Creek freedmen, the roll made by J. W. Dunn, under the authority of the United States, prior to March 14, 1867, being confirmed, and the Commission being directed to enroll all persons now living whose names are found on said roll, and their descendants, with "such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

The Commission was authorized and directed to make correct rolls of the citizens by blood of all the tribes other than the Cherokees, "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes."

It was also provided that "no person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship."

The Commission was authorized to make the rolls descriptive of the persons thereon, so that they might be thereby identified, and to take a census of each of said tribes, "or



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to adopt any other means by them deemed necessary to enable them to make such rolls;" and it was declared that "the rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The act provided further for the resubmission of the two agreements, with certain specified modifications, that with the Choctaws and Chickasaws, and that with the Creeks, for ratification to a popular vote in the respective nations, and that if ratified, the provisions of these agreements so far as differing from the act should supersede it. The Choctaw and Chickasaw agreement was accordingly so submitted for ratification August 24, 1898, and was ratified by a large majority, but whether or not the agreement with the Creeks was ratified does not appear.

The twenty-sixth section provided that, after the passage of the act, "The laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory;" and the twenty-eighth section, that after July 1, 1898, all tribal courts in the Indian Territory should be abolished.

The agreement with the Choctaw and Chickasaw tribes contained a provision continuing the tribal government, as modified, for the period of eight years from March 4, 1898; but provided that it should "not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

For reasons already given we regard this act in general as not obnoxious to constitutional objection, but in so holding we do not intend to intimate any opinion as to the effect that changes made thereby, or by the agreements referred to, may have, if any, on the status of the several applicants, who are parties to these appeals.

The elaborate opinions of the United States court in the Indian Territory by Springer, J., Clayton, J., and Townsend, J., contained in these records, some of which are to be found



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in the report of the Commissioner of Indian Affairs for 1898, page 479, consider the subject in all its aspects, and set forth the various treaties, tribal constitutions and laws, and the action of the many tribal courts, commissions and councils which assumed to deal with it, but we have not been called on to go into these matters, as our conclusion is that we are confined to the question of constitutionality merely.

As we hold the entire legislation constitutional, the result is that all the

*Judgments must be affirmed.*

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA dissented as to the extent of the jurisdiction of this court only.

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